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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ILLINOIS COMMERCE COMMISSION and
PEOPLE OF THE STATE OF ILLINOIS,

and

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The Interstate Commerce Act as amended by the Staggers Rail Act of 1980 requires State regulatory commissions which exercise authority over intrastate rail carrier operations to submit their regulatory standards and procedures to the Interstate Commerce Commission for approval. The Commission must grant such approval, which the statute calls "certification," if it determines that the State-submitted intrastate standards and procedures are in accordance with interstate standards and procedures. Against this background, the following questions are presented in this petition:

1. Whether the District of Columbia Circuit's holding that the Staggers Act totally preempted State rail authority and then "restored some of it as a matter of legislative grace" is consistent with this Court's longstanding policy disfavoring a finding of preemption unless Congress has unmistakably so ordained?

2. Whether the District of Columbia Circuit erred in affirming an ICC decision which requires State regulatory commissions, in order to receive "certification," to agree to automatically adopt for intrastate purposes the result of the ICC's application of a statutory standard — the exemption provision of the Interstate Commerce Act?

3. Whether the District of Columbia Circuit erred in holding that the Staggers Rail Act permits the ICC to exempt rail carriers from State authority, thereby preempting all State rail jurisdiction.

4. Assuming the premise of the majority opinion that Congress intended to totally preempt State authority is incorrect, does the U.S. Constitution bar the Interstate Commerce Commission from reducing the authority of

certificated States when the intent of the statute is to preserve State jurisdiction and when the statute contains no such provision?

THE PARTIES

The parties to the proceeding before the District of Columbia Circuit appear below.

Petitioner and Intervenors supporting Petitioner:

Illinois Commerce Commission and the People of the State of Illinois;
National Association of Regulatory Utility Commissioners;
Alabama Public Service Commission;
Kansas Corporation Commission; and
State of Texas

Respondents and Intervenors supporting respondents:

Interstate Commerce Commission;
United States of America;
Atchison, Topeka and Santa Fe Railway Company;
Baltimore and Ohio Chicago Terminal Railroad Company;
Baltimore and Ohio Railroad Company;
Belt Railway Company of Chicago;
Burlington Northern Railroad Company;
Chicago and North Western Transportation Company;
Chicago, Milwaukee, St. Paul and Pacific Railroad Co.;
Consolidated Rail Corporation;
Elgin, Joliet and Eastern Railway Company;
Illinois Central Gulf Railroad Company;
Missouri Pacific Railroad Company;
Norfolk and Western Railway Company;
St. Louis Southwestern Railway Company;
Seaboard System Railroad, successor to Louisville and Nashville Railroad Company;
Soo Line Railroad Company; and
Southern Railway Company

Petitioner Illinois Commerce Commission is the agency established under the laws of the State of Illinois to regulate, *inter alia,* the rates and services of rail carriers providing intrastate transportation within the State. Petitioner National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization. Within its membership are the governmental agencies of the fifty States and of the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of carriers and utilities. More specifically, the members of the NARUC include the State officials responsible for ensuring that rail carriers operating in their respective jurisdictions provide transportation services in a lawful, financially responsible manner.

Neither Petitioner is incorporated or affiliated with other corporations.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Illinois Commerce Commission and the People of the State of Illinois (Illinois) and the National Association of Regulatory Utility Commissioners (NARUC) jointly petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit issued December 11, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals, attached as Appendix A, is reported at 749 F.2d 875 (D.C. Cir. 1984). The orders of the Court of Appeals denying the

petitions for rehearing and suggestions of rehearing en banc (Appendixes B and C) are not reported. The decisions of the Interstate Commerce Commission (Appendices D and E) are reported at 367 I.C.C. 149 (1983) and 365 I.C.C. 855 (1982), respectively. The orders of the Illinois Commerce Commission adopted on May 12, 1982 concerning the issue of intrastate rail exemptions (First Amended General Orders No. 219 and 225) are attached as Appendix F. Early, unreported decisions of the Interstate Commerce Commission appear in Appendices G, H, and I.

JURISDICTION

The decision of the panel of the Court of Appeals was entered on December 11, 1984. Petitioners' timely petition for rehearing and suggestion for rehearing en banc was denied on February 20, 1985, and this petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 2350(a).

STATUTES INVOLVED

The relevant statutory provisions of the Interstate Commerce Act as amended by the Staggers Rail Act of 1980 are 49 U.S.C. §§10101a, 10501, 10505, and 11501. These provisions are set forth in Appendix J.

STATEMENT OF THE CASE

By enactment of the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (1980) (Staggers Act), Congress established a unique regulatory scheme with the purpose of ensuring that the respective State commissions regulated intrastate railroad rates and services in accordance with Federal standards and procedures. Specifically, in section

214 of the Staggers Act,[1] Congress established a two-stage process by which the Interstate Commerce Commission (ICC or the Commission) would regulate the intrastate regulatory activities of the States through (1) certification of a State's intention to regulate rail carriers in accordance with Federal standards and procedures, and (2) review of State decisions to determine if these intentions were fulfilled.[2]

It is the ICC's use of its authority to certify the regulatory standards and procedures of the States that is at issue in this case. As codified at 49 U.S.C. §11501(b), the State certification provision of the Staggers Act requires that each State regulatory commission wishing to retain any intrastate rail jurisdiction be certified by the Commission. To achieve such certification, section 11501(b)(2)

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[1]Codified in the Interstate Commerce Act at 49 U.S.C. §11501(b) and (c), (West Supp. 1984). Appendix J. Subsequent references to section 214 of the Staggers Act shall be to the codification.

[2]Prior to the passage of the Staggers Act, the ICC's authority to supervise State rail decisionmaking was found in the Congress' codification [in 49 U.S.C. §11501(a) (West Supp. 1979)] of this Court's *Shreveport* decision. *Houston, E. & W.T. Ry. v. United States,* 234 U.S. 342 (1914). In *Shreveport,* the Court held that the Commission had the implicit authority to review and revise intrastate rate levels in order to remove undue burdens upon or unreasonable discrimination against interstate commerce even when such intrastate rates were lawful under applicable State law. The basic *Shreveport* doctrine survived until the passage of the Staggers Act, which amended section 11501 to repeal (for purposes of rail regulation) the "undue burden/unreasonable discrimination" test established in *Shreveport.* Cf. 49 U.S.C. §11501(a) (West Supp. 1979) and 49 U.S.C. §11501(a) (West Supp. 1984). Under the Staggers Act, the Commission was directed to review individual State rail decisions to determine if the regulatory standards and procedures employed were in accordance with the Interstate Commerce Act, and not if such decisions were discriminatory or burdensome on interstate commerce. 49 U.S.C. § 11501(c) (West Supp. 1984)

mandates that each State agency seeking certification submit to the ICC within 120 days of the effective date of the Staggers Act (October 1, 1980) the "standards and procedures" the State intends to use to regulate intrastate rail carriage. Section 11501(b)(3)(A) in turn requires the ICC (within 90 days of receiving a State submission) to certify the petitioning State if it finds the submitted "standards and procedures" to be "in accordance with the standards and procedures applicable to regulation of rail carriers" under the Interstate Commerce Act as amended. In short, the statute dictates that unless a State commission gains the Commission's approval of its intended system for regulating intrastate rail services, the State's authority to regulate would be totally preempted.[3]

Following the enactment of the Staggers Act, the Commission established a proceeding to implement the certification provisions of 49 U.S.C. §11501(b) – Ex Parte No. 388, *State Intrastate Rail Rate Authority – P.L. 96-448* (Ex Parte 388). On November 10, 1980, the ICC published its Notice of Filing Requirement in Ex Parte 388, 45 *Fed. Reg.* 74571 (November 10, 1980) (Appendix I) in which it informed the States that the certification process would not be "a difficult one." The Commission requested that each State simply submit within the 120-day statutory time frame a statement from its State commission "that the State authority intends to exercise jurisdiction consistent with the law, and to do so in a timely fashion." *Id.*

The certification process did not unfold as smoothly as the drafters of the Commission's November 1980 Notice

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[3]The United States Court of Appeals for the Fifth Circuit has upheld the constitutionality of certain provisions of the Staggers Act, including the State certification requirements. *Texas v. United States,* 730 F.2d 339 (5th Cir. 1984), *cert. den.,* ____ U.S. ____, 53 U.S.L.W. 3270 (October 9, 1984).

had expected. In April 1981, the ICC rejected the forty State submissions filed in response to the November Notice, and instead granted these States "provisional certification" pending the submission of additional information. *46 Fed. Reg.* 23335 (April 24, 1981) (Appendix H). Following the submission of additional evidence of acceptable standards and procedures by the States, the ICC in February 1982 certified no petitioning States, extended "provisional certification," and required the submission of "updated" State standards and procedures. 47 *Fed. Reg.* 5786 (February 8, 1982) (Appendix G).[4]

In response to the Commission's February 1982 directive, the Illinois Commerce Commission, Petitioner herein, on May 12, 1982 adopted regulatory standards and procedures which it submitted for ICC certification on May 14, 1982.[5] In its submission, Illinois sought to address each of Federal "standards and procedures" applicable to interstate rail regulation by the ICC including, *inter alia,* the exemption provisions of 49 U.S.C. §10505.[6] In its First Amended General Order No. 219, Illinois stated the following with regard to exemptions:

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[4]Although 49 U.S.C. §11501(b) grants the ICC no authority to "provisionally" or "conditionally" certify a State, the U.S. Court of Appeals for the Seventh Circuit upheld the Commission's April 1981 provisional certification decision as within its general authority to administer the Staggers Act and to avoid the loss of intrastate jurisdiction by every State in the Nation. *Illinois Central Gulf R. Co. v. ICC,* 720 F.2d 958, 962 (7th Cir. 1983). *Accord, Utah Power & Light Co. v. ICC,* 747 F.2d 721, 726 (D.C. Cir. 1984).

[5]"Adoption of First Amended General Orders 219 through 225 implementing the Staggers Rail Act of 1980. Repeal of General Orders 219 through 225," No. 82-0331 (Ill. C.C. May 12, 1982). *See* Appendix F.

[6]49 U.S.C. §10505 appears in Appendix J.

> Illinois may undertake an exemption proceeding either on its own motion or upon petition from any interested party. An exemption granted for a class of interstate traffic shall not automatically apply in Illinois. Each exemption initiative shall be considered individually, in accordance with the provisions of General Order 225.[7]

In its First Amended General Order No. 225,[8] Illinois described the manner in which it would employ section 10505, stating, *inter alia,* that an ICC decision exempting interstate class of rail traffic would not automatically exempt such traffic in intrastate commerce within the State. Rather, Illinois stated that ICC exemption decisions could provide the basis for a proceeding in which the State commission would "evaluate feasible changes in Illinois intrastate regulation which might be consistent with [ICC] regulation." (*Id.*).[9]

On July 28, 1982, the ICC generally approved the Illinois request for permanent certification. (Appendix E).[10] The Commission devoted much of its decision to Illinois' exemption proposal, noting the State's intention not to be automatically bound by the Commission's intrastate exemption decisions. (App. at 56a-58a) Initially, the ICC ap-

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[7]App. at 65a.

[8]App. at 65a.

[9]Illinois also stated that it would conduct intrastate exemption proceedings, on its own motion or pursuant to petition, unrelated to ICC actions. Further, Illinois adopted evidentiary standards parallel to the statutory tests prescribed in section 10505. (App. at 66a)

[10]Procedurally the ICC "tentatively concluded" that the Illinois submission met the certification requirements of section 11501(b), announcing it would permanently certify the State unless interested persons submitted comments showing the State's "standards and procedures" to be unacceptable (App. at 54a).

peared to tentatively accept Illinois' exemption language, requesting public comment on its analysis that "Section 11501(b) does not appear to require State adoption or endorsement of every ICC exemption. The requirement for certification is that the State apply the same section 10505 criteria." *(Id.)* In its next paragraph, however, a unanimous Commission stated without equivocation that Illinois' decision not to automatically follow ICC exemptions would not prevent the State's certification:

> Recognizing that we may have an opportunity to review a State's failure to follow an interstate exemption, *we conclude* that the Illinois position that it will not automatically follow an interstate exemption is not a bar to certification.
>
> (*Id.*, emphasis added)

Five months later, the ICC's firm conclusion that Illinois' exemption proposal was certifiable evaporated. In its January 23, 1983 decision in Ex Parte 388, the Commission determined (Commissioner Simmons and Chairman Taylor dissenting) that Illinois would not be certified unless the State agreed to automatically adopt the ICC's interstate exemption orders. (Appendix D) The ICC majority held that the State's intention to apply the exemption *standard* of 49 U.S.C. §10505 "is not enough." (App. at 46a). The majority determined that the *result* of its application of this standard to interstate traffic must be implemented by Illinois without notice, hearing or decision by the State commission. The majority based its determination not on an analysis of the statutory relationship of sections 10505 and 11501, but rather "upon the goals of the Staggers Act, the rail transportation policy, and serious practical considerations." (*Id.*).

In his vigorous dissent, Commissioner Simmons, joined by Chairman Taylor, analyzed section 11501(b) and con-

cluded that Illinois must be certified if it adopted the exemption standards found in section 10505, and therefore, need not agree to be automatically bound by the result of ICC exemption proceedings. Beyond the provision of section 11501(b) which defines State requirements in terms of "standards and procedures," Commissioner Simmons also noted that the ICC's exemptive authority pursuant to section 10505 is expressly limited to transportation subject to its original jurisdiction (interstate traffic and non-certified intrastate traffic), that the ICC had ample authority to review, reverse and revise State exemption decisions pursuant to section 11501(c), and that because intrastate transportation considerations may differ from interstate circumstances, automatic extension of interstate exemptions is unwarranted. (App. 49a-50a).

The ICC concluded its decision by unconditionally certifying Illinois, effective February 25, 1983, if the State agreed, *inter alia*, to automatically adopt the result of ICC exemption proceedings by that date. Illinois sought review of the ICC's January 27 decision on the day it was served in the U.S. Court of Appeals for the District of Columbia Circuit,[11] invoking that Court's jurisdiction under 28 U.S.C. §§2321 and 2342(5) (1982). Subsequently, the National Association of Regulatory Utility Commissioners (NARUC) was granted leave to intervene before the Court of Appeals on March 8, 1983.[12]

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[11]Although Illinois remains steadfast in its refusal to automatically accept ICC exemption orders, the Commission has not revoked the State's provisional certification, which remains in effect. Illinois has, however, agreed to all other changes required by the ICC, leaving the exemption issue the only bar to permanent certification.

[12]The Alabama Public Service Commission, the Kansas Corporation Commission and a group of rail carriers also successfully intervened. The State of Texas was permitted to appear as *amicus curiae* urging reversal of the ICC's decision.

Following briefing and oral argument, a panel of the Court of Appeals, by a 2-1 vote (Judge Scalia dissenting), affirmed the Commission's requirement that the States agree to be automatically bound by interstate exemption orders as a prerequisite to certification. (Appendix A).[13] The panel majority began its analysis of this issue of first impression by examining the structure of 49 U.S.C. §11501 as amended by the Staggers Act, and concluded that in 1980, Congress had "totally preempted State authority" and "then restored some of it as a matter of legislative grace" through the certification process. (App. at 6a) After determining that it had jurisdiction to review the ICC's decision (App. at 10a), the panel majority then held that the Commission's construction of section 11501(b) to require the automatic adoption of interstate exemptions was entitled to "great deference." (App. at 11a) In so holding, the panel majority rejected arguments that under *North Carolina v. United States,* 325 U.S. 507 (1945), the ICC's decision must meet a high standard of certainty because of its preemptive effect. (App. at 15a).[14]

Based upon its twin premises of total preemption and great deference to the Commission's decision, the panel majority affirmed the ICC's construction of section 11501(b) to require the adoption of exemptions as "reasonable." (App. at 19a) With scant attention to the language of the statute. the panel majority based its decision on the need for the ICC to ensure that the States did not

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[13]The panel's opinion is reported at 749 F.2d 875 (D.C. Cir. 1984).

[14]In rejecting *North Carolina v. United States,* the panel majority explicitly recognized that its reasoning conflicted with a recent decision of the U.S. Court of Appeals for the Third Circuit which found the *North Carolina* case applicable to the ICC's preemptive decision-making. *Wheeling-Pittsburgh Steel Corp. v. ICC,* 723 F.2d 346, 351 (3d Cir. 1983). (App. at 16a, n. 11).

frustrate the deregulatory goals of the Staggers Act by conducting their own intrastate exemption proceedings. (App. at 18a) Given that section 11501(b) totally preempted State regulation, the panel majority reasoned, States should not be heard to complain that the ICC had limited the independence of its State "regulatory agents" through the certification process. (App. at 20a) Finally, the panel majority concluded that its decision was correct because under 49 U.S.C. §10505 (the interstate exemption provision), the ICC could exempt rail carriers from the coverage of section 11501 entirely, thereby precluding all State regulation of their intrastate traffic. (App. at 21a).

In his dissent, Judge Scalia strongly disagreed with the panel majority's reasoning, finding that the crucial premise of the majority's decision (total State preemption and cede-back as a matter of legislative grace) "has no basis in reality." (App. at 26a). Examining the statute — section 11501 — and its legislative history, Judge Scalia found that the certification provisions represented a partial federal preemption based upon a compromise between congressional advocates of total preemption and non-preemption. (App. at 28a) As such, Judge Scalia asserted that section 11501(b) should be construed under traditional analysis which "presumes the absence of preemption unless it clearly appears." (App. at 27a) Based upon the traditional presumption of non-preemption, the dissent analyzed section 11501(b) and concluded that that section requires that the States in order to be certified adopt Federal standards (such as the exemption standard of section 10505) and not the result of the ICC's interstate application of that standard. (App. at 29a-32a) Recognizing that the ICC's decision was owed "some deference," Judge Scalia determined that such deference could not permit the agency to ignore the plain language of the statute "to call

an exemption a standard." (App. at 32a) The dissent also took issue with the majority's "supplemental argument" that section 10505 permitted the ICC to exempt carriers from State regulation, finding that section 11501 is beyond the scope of the exemptive authority, section 10505, which affects interstate rail matters. (App. at 36a) Judge Scalia concluded by stating that the majority's misreading of the legislative compromise preserving meaningful State rail authority violated the careful draftsmanship of its congressional authors. (App. at 37a).

On January 24, 1985, Illinois and the NARUC filed with the Court of Appeals a petition for rehearing and suggestion for rehearing *en banc*. On February 20, 1985, the panel denied the petition for rehearing (App. B), and the full court by a 7-3 vote refused to hear the case. (App. C)[15] This petition for certiorari of the panel's December 11, 1984 decision is filed within 90 days of these orders.

REASONS FOR GRANTING THE WRIT

This is a case of both first impression and national significance involving the respective roles of the Commission and the State regulatory authorities over the regulation of intrastate rail rates. The decision of the ICC requiring States to agree to automatically adopt interstate exemption decisions in order to exercise any intrastate jurisdiction affects every State in the nation. More threatening to the continued vitality of State rail regulation, however, is the panel majority's finding that 49 U.S.C. §11501 constitutes total preemption and restoration of

[15] Judges Bork, Scalia and Starr would have granted the suggestion for rehearing *en banc*.

authority as a member of legislative grace. (App. at 6a) This novel construction of the statute, which directly conflicts with this Court's traditional preemption analysis, Congressional intent, and decisions of other Courts of Appeals, would appear to grant the ICC license to run roughshod over the State regulatory commissions, in violation of the legislative compromise preserving State authority. Indeed, the majority's construction of the statute accords the Commission the authority under 49 U.S.C. §10505 to completely extinguish all State regulatory authority.

We do not doubt that section 11501 as amended by the Staggers Act is preemptive of unfettered State discretion, but so were the legal standards applicable to State rail regulation prior to the Staggers Act. The questions presented are whether section 11501 *totally* preempts State authority and whether such preemption can support a reading of section 11501(b) such that the *result* of the Commission's application of the interstate exemption standard of section 10505 becomes transformed into a *standard* which must be automatically adopted by the States to be certified. Left undisturbed, the conclusions of the panel majority can only constitute the virtual repeal of meaningful regulatory role for the States.

A. The Panel Majority's Holding That Section 11501 Totally Preempted State Authority and "Restored Some As A Matter of Legislative Grace" Conflicts With This Court's Traditional Preemption Analysis, Decisions of Other Courts of Appeals and The Intent of Congress

The basic premise of the panel majority's decision affirming the Commission's construction of 49 U.S.C. §11501(b) is its conclusion that that section "totally

preempted State authority . . . then restored some as a matter of legislative grace." (App. at 6a) Because this conclusion directly conflicts with the traditional analysis this Court has established to consider questions of preemption, this petition should be granted.

In his dissent, Judge Scalia ably described standard preemption doctrine, of which there can be "no doubt." (App. at 27a). In analyzing the preemptive effect of congressional legislation, Federal courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1943). Indeed, this Court has often stated that it "is generally reluctant to infer pre-emption." *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 132 (1978); *Community Communications Co. v. Boulder,* 455 U.S. 40, 61 (1982) (Rehnquist, J. dissenting). Only when Congress has "unmistakably . . . ordained" that Federal enactments must prevail will State law be preempted. *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142 (1963).

The panel majority turned this well-settled doctrine on its head in analyzing the scope of preemption under 49 U.S.C. §11501. After concluding that Congress intended to preempt State rail authority (a conclusion with which no one could disagree), the panel majority presumed *total preemption* of all State regulation, rather than construing the statute narrowly to avoid preemption. (App. at 6a) In so doing, the panel majority twisted Congress' intent in enacting section 11501(b). As Judge Scalia noted, that section represented a compromise between Congressional advocates of total preemption and of the status quo. (App. at 28a) Refusing to even acknowledge this Congressional compromise, however, the panel majority grasped

for one line in the conference report accompanying the Staggers Act to support its theory of total preemption. (App. at 5a)[16]

However, the panel majority overlooked a wealth of information documenting Congress' intent not to totally preempt State rail regulation. First of all, the original version of the Staggers Act introduced in the House of Representatives which would have totally preempted the States *did not pass.*[17] Secondly, Congress left virtually intact the provision of the ICC's basic jurisdictional statute which limits the Commission's authority over intrastate rail transportation. 49 U.S. §10501(c) (App. J).[18] Thirdly, Representative Broyhill's Amendment to the bill which became the Staggers Act *did pass.* Prompted by the "great concern" expressed by the State regulatory commissions concerning total preemption,[19] the Broyhill Amendment was adopted by the Congress in section 11501 as a compromise which avoided the total preemption of State regulatory authority originally proposed.[20]

Despite these clear indications that Congress had not "unmistakably ordained" the total preemption of the States,[21] the panel majority presumed that very result, in conflict not only with this Court's traditional preemption doctrine, but with decisions of other Courts of Appeals

[16]H.R. Conf. Rept. No. 1430, 96th Cong. 2d Sess. 106 (1980).

[17]H.R. 7235, 96th Cong. 2d Sess. (1980).

[18]The language of section 10501(c) preserving State police powers directly parallels this Court's rule that preemption should not be assumed, quoted in *Rice v. Santa Fe Elevator Corp., supra* at 13. Section 10501(c) effectively denies the ICC original jurisdiction to decide intrastate rail issues in certified States.

[19]126 Cong. Rec. 18,298 (1980).

[20]H.R. Rept. No. 1430, 986th Cong., 2d Sess. 105-106 (1980).

[21]*Florida Lime & Avocado Growers v. Paul, supra* at 13.

dealing with section 11501. The most direct such conflict involves the Third Circuit's decision in *Wheeling-Pittsburgh Steel Corp. v. ICC*, 723 F.2d 346 (3d Cir. 1983), construing the very same statutory provision – section 11501(b) – as the panel majority. Because the Third Circuit's decision contrasts so starkly with the panel majority's erroneous reasoning, it is worthy of extensive quotation:

> Section 11501(b) represented a compromise between those favoring Federal preemption of State authority over intrastate ratemaking and those advocating continuing State control over intrastate rates. As introduced in the House of Representatives, the predecessor to section 11501(b) would have divested the States of all authority over rates under the Commission's jurisdiction. Criticism of this provision by a number of State public service commissions led Congressman Broyhill to propose an amendment to the House bill preserving State jurisdiction over intrastate rates, subject to the condition that State regulatory authorities apply Federal substantive rule and certify that their procedures are compatible with Federal procedures. With only minor modification, this amendment became section 11501(b).
>
> *Contrary to the ICC's contention, the legislative history of the Staggers Act indicates that the Act did not fundamentally reallocate Federal and State ratemaking authority.* Neither the Act nor its legislative history indicates any intention to overrule the Supreme Court's holding in *North Carolina* or to limit its application to challenges under section 11501(a). Rather, it appears that Congress, by rejecting Federal preemption of in-

> trastate rates, intended to preserve this traditional sphere of State competence. It follows, then, that the ICC must, in exercising its authority under section 11501(b) to preempt State rates for nonconformity with Federal standards or procedures, make the basis for its preemption order clear. This is essential if State regulatory authorities are to fulfill the obligation vested in them by Congress to regulate intrastate rates in accordance with federal standards.
>
> 723 F.2d at 352-353.
> (citations omitted and emphasis supplied)

Although the Third Circuit's decision is the most direct conflict with the panel majority's reasoning, the Court of Appeals for the Fifth Circuit in upholding the constitutionality of, *inter alia,* section 11501(b) described that section as something less than total preemption. *Texas v. United States,* 730 F.2d 339 (5th Cir. 1984). "First, *to avoid complete federal preemption,* a State agency must receive ICC certification of its standards and procedures" under section 11501(b). *Id.* at 347 (emphasis supplied). In the Fifth Circuit's view, then, the purpose of section 11501(b) is to provide the States an avenue by which total preemption can be avoided, and not, as the panel majority suggests, a different route to the same end – total preemption. In sum, the panel majority is alone in its finding that the statute completely preempts State regulation and makes the State commissions "regulatory agents of the Federal government." (App. at 20a)[22]

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[22]The panel majority's reasoning also directly conflicts with the contemporaneous decision of another panel of the District of Columbia Circuit construing section 11501(b), *Utah Power & Light Co. v. ICC,* 747 F.2d 721 (D.C. Cir. 1984), wherein the Court stated:

> "In the course of enacting the Staggers Act, Congress expressly rejected a sweeping federal preemption of the State

In 1945, this Court restated in the context of Federal preemption of State intrastate rail authority the basic preemption doctrine it has unswervingly applied. *North Carolina v. United States,* 325 U.S. 507 (1945). Preemption cannot be assumed, but rather "the justification for the 'exercise of the federal power must clearly appear'." *Id.* at 511. A Commission decision preempting a State "must meet 'a high standard of certainty'." *Id.* Because the panel majority's construction of section 11501 violates this Court's preemption doctrine, including *North Carolina v. U.S.*, conflicts with the decisions of other circuits, and ignores the intent of Congress, certiorari should be granted.

B. The Panel Majority's Ruling That The States Must Agree to Adopt ICC Exemption Decisions To Be Certified And Thereby Retain Any Rail Jurisdiction Is Erroneous

The question of whether 49 U.S.C. §11501(b) requires the States to agree to be automatically bound by every exemption issued by the ICC in order to be certified is an issue of first impression. The panel majority deferred to the ICC's construction requiring lockstep State adoption of ICC exemptions, finding this reading of the statute to be "reasonable" in light of the purported deregulatory

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regulatory role. Such preemption was originaly provided for in the bill that became the Staggers Act, but the attempt to oust the States completely from some regulatory role in intrastate rates was defeated. Instead, a compromise resulted which guaranteed that '[i]ntrasate rail movements [in most cases] will continue to be regulated by State regulatory agencies with uniformity and consistency.' 126 Cong. Rec. H8548 (daily ed. Sept. 9, 1980) (statement by Rep. Staggers)."

747 F.2d at 726.
(footnote omitted)

philosophy of the Staggers Act. (App. at 19a).[23] As Judge Scalia describes in his dissent, however, the ICC's construction of the statute, even when viewed deferentially, is wrong, because it flies in the face of the plain language of the statute, has little support in the legislative history, and violates the basic congressional compromise preserving a meaningful State regulatory role. (App. at 29a-37a).

It would seem axiomatic that in deciding an issue of statutory construction, a reviewing court should begin with the relevant statutory language. In its analysis of the ICC's construction of section 11501 (i.e., that the *result* of an interstate exemption proceeding is a "Federal standard"), the panel majority completely ignored the text of the law. (App. at 17a). Section 11501, by its terms, states that to be certified, a State must submit for ICC approval only the "standards and procedures" used by the State to regulate intrastate rail matters. §11501(b)(2). If such standards and procedures "are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission," the ICC *must certify* the petitioning State. §11501(b)(3)(A). There is absolutely no textual support for the Commission's and panel majority's conclusion that these provisions require States to agree to be bound by ICC exemption *decisions* to be certified. As

[23]We submit that the Commission's construction of section 11501(b) is not entitled to "great deference" as the panel majority concluded. (App. at 11a) The Commission's construction of section 11501(b) ignored the plain language of the statute, reversed a unanimous and firm conclusion issued not 6 months prior, was not contemporaneous with passage of the law, included the dissent of 2 of 6 commissioners including the Chairman, and ignored the congressional compromise to preserve State regulation. Of course, the ICC is entitled to little deference if its construction violates the plain language of the statute. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32, 36-37 (1981).

Judge Scalia notes, section 11501(b) establishes a clear distinction between Federal "standards and procedures" (such as the exemption criteria of section 10505) which bind the States through certification, and carrier "rates, classifications, rules, and practices" (such as the issuance of intrastate exemption decisions) over which the States exercise initial independent authority subject to ICC review under section 11501(c). (App. at 29a-31a).[24]

Because Judge Scalia's analysis of section 11501 is correct, and indeed unassailable, it is not surprising that the panel majority refused to debate the dissent on the text of the statute. However, by avoiding this opportunity to commit "mayhem upon the mother tongue as to call an exemption a standard" (App. at 33a), the panel majority has no textual anchor to support its conclusion that calling "a criterion a conclusion or a test an outcome" (App. at 31a) is reasonable. Rather, the panel majority was left to intimate that since Congress totally preempted State regulation, virtually any decision, policy, rule, order or utterance of the Commission with regard to interstate rail traffic becomes a "Federal standard" which must be automatically adopted by the States. (App. at 20a). This theory of the statute, divorced as it is from the statutory text, ignores the carefully crafted legislative compromise to preserve State regulation. We cannot quarrel with the panel majority's finding that independent State exemption authority subject to ICC review is less efficient and less "deregulatory" than total preemption. However, except

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[24]Moreover, in its statement of rail transportation policy, Congress directed ICC cooperation with the States to assure that State regulation "is exercised in accordance with the *standards*" of the Interstate Commerce Act. 49 U.S.C. §10101(a) (emphasis supplied) (App. at 104a).

for certain areas of regulation (not including exemptions) such as general, inflation-based and fuel surcharge rate matters (§11501(b)(6)),[25] Congress purposely rejected the sort of "efficiency" that total preemption would permit in order to preserve a regulatory role for the States. Therefore, the panel majority erred by failing to reverse an administrative "construction [ ] of the statute . . . that [is] inconsistent with the statutory mandate" and "frustrate[s] the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

The panel majority's reliance on the Third Circuit's decision in *Wheeling-Pittsburgh, supra,* and the Seventh Circuit's decision in *Illinois Central Gulf R.R. v. ICC,* 702 F.2d 111 (7th Cir. 1983), to support its broad reading of the statute is misplaced. (App. at 18a). These cases are readily distinguishable because they arise in the context of proceedings *under section 11501(c)* in which the ICC reviewed State adjudicatory decisions. It is no small irony that these decisions are used to support a holding that in the case of exemptions, the States are not entitled to conduct any adjudicatory proceeding. All Illinois and its sister States request is that they be afforded the same opportunity to decide in the first instance, subject to ICC review under section 11501(c), whether a specific exemption is appropriate in their respective jurisdictions.

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[25] As section 11501(b)(6) makes clear, Congress knew how to totally preempt State regulation when it felt such preemption to be necessary. In that section, Congress stated unequivocally that rail carriers could avail themselves of ICC-authorized general rate increases, inflation-based increases and fuel adjustment surcharges over all of their operations without State interference. Notably absent from this list is the issue of ICC-authorized exemptions. By its decision, the panel majority has of course, added exemptions to these areas of total Federal preemption, despite congressional silence on the issue.

In sum, the panel majority's decision to uphold the ICC's "reasonable construction" of section 11501 cannot stand. This case must be heard by this Court in order to conform the ICC's understanding of the requirements of the certification process to the plain language of the statutory text and the compromise between State and Federal interests embodied in the Staggers Act.

C. The Panel Majority's Ruling That Section 10505 Permits The ICC To Exempt Carriers From State Regulation Is Clearly Erroneous

Despite the panel majority's premise that 49 U.S.C. §11501 totally preempts State rail regulation, its conclusion that the ICC may in effect abolish State authority through the exemption mechanism of 49 U.S.C. §10505 is startling. (App. at 21a). This construction, which was never argued by any party to this case, would provide the ICC the legal authority to completely subvert the congressional compromise preserving State regulation embodied in the Broyhill Amendment to the Staggers Act.[26] The panel majority's finding, unless reversed by this Court, has a chilling effect on State regulatory commissions seeking to exercise authority under the certification provisions of section 11501(b). Under the panel majority's construction of section 10505, State commissions which have struggled to become certified may find that they have lost all jurisdiction not because their respective "standards and procedures" are not in accordance with Federal law (49 U.S.C. § 11501(b)(4)(B)), but because the ICC had made an independent finding under section 10505 that State regulation is unnecessary.

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[26]See *supra*, at 14.

We submit that the panel majority's construction is unsupportable. Section 10505(a), by its terms, grants the ICC jurisdiction to authorize exemptions only for transportation subject to its jurisdiction. However, 49 U.S.C. §10501(b)(1) denies the Commission direct interstate rail jurisdiction. As 49 U.S.C. §10501(c) makes clear, only in noncertified States may the ICC act initially with regard to intrastate matters. In its eagerness to assist the ICC's preemptive assault on the States, the panel majority ignores these provisions of the statute, and in so doing, thwarts the intent of Congress that sections 11501(b) and (c) would provide the mechanism by which the ICC would ensure uniform and consistent State rail regulation.

D. ICC Discretionary Authority Is Barred By The U.S. Constitution

The panel majority made short shrift of the Constitutional argument, having already determined that total preemption of State regulation of intrastate rail rates was the intent of the Staggers Act. (App. at 22a-25a) However, Illinois did not challenge the constitutionality of the Staggers Act but the action of the Interstate Commerce Commission. The panel's argument finds no distinction by Congress between total prohibition and certification. (*Id.*)

The only statutory limitation on the power of certified State to apply the Staggers Act standards and procedures is 49 U.S.C. §11501(b)(6). Given that the intent of certification was to preserve State authority,[27] federalism as expressed in the Tenth Amendment of the U.S. Constitution limits the ICC from further restriction of the certified

[27]See *supra*, at 14, and 126 Cong. Rec. 6016 (1980), and H. Conf. Rpt. 96-1430, *supra*, 126 Cong. Rec. 9921-2 (1980).

States. Absent express or implied authorization, the ICC's discretionary authority must give way when it contravenes any Constitutional provision.

In rejecting the Constitutional argument, the majority attempted to use the *Usery*[28] test which has been rejected as unworkable by this Court. *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. ____, 83 L.Ed.2d 1016, 105 S.Ct. 1005 (1985). The panel majority found that lock-stepping of State regulation does not regulate "States as States." The panel majority is in error since the right of certified States to apply the exemption standards and procedures is the issue here. Reliance on *Hodel* is misplaced since, in *Hodel,* Congress explicitly excluded the States from a decisional role. *Hodel v. Virginia Surface Mining & Reclamation Ass'n.,* 452 U.S. 264, 269 (1981). The Staggers Act continues the States as regulators albeit under uniform standards and procedures.

Petitioners urge that the Court find that the attempt of the ICC to remold the statute be found barred by the Tenth Amendment under the logic of *FEC v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 32 (1981). Otherwise, federalism becomes indistinguishable from centralization, i.e., displacement of State government at the whim of a federal agency.

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[28] *National League of Cities v. Usery,* 426 U.S. 855 (1976).

CONCLUSION

For the reasons herein stated, Petitioners respectively request that a writ of certiorari issue to the Court of Appeals in order to review the panel majority's opinion.

Respectfully submitted,

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DATED: May 21, 1985

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1120

ILLINOIS COMMERCE COMMISSION and
PEOPLE OF THE STATE OF ILLINOIS, PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS,
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
ALABAMA PUBLIC SERVICE COMPANY,
KANSAS CORPORATION COMMISSION, INTERVENORS

Petition for Review of an Order of the Interstate Commerce Commission

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Argued December 6, 1983

Decided December 11, 1984

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

James E. Weging for petitioners.

Charles D. Gray, with whom *Paul Rogers* and *Genevieve Morelli* were on the brief, for intervenor National Association of Regulatory Utility Commissioners. *Deborah A. Dupont* also entered an appearance for intervenor National Association of Regulatory Utility Commissioners.

John J. McCarthy, Jr., Attorney, Interstate Commerce Commission, with whom *John Broadley*, General Counsel, *Lawrence H. Richmond*, Deputy Associate General Counsel, Interstate Commerce Commission, *John J. Powers, III*, and *John P. Fonte*, Attorneys, Department of Justice, were on the brief, for respondents. *Laurence H. Schecker*, Attorney, Interstate Commerce Commission, also entered an appearance for respondents.

Betty Jo Christian, with whom *Richard E. Weicher*, *John J. Paylor*, *Howard D. Koontz*, *Richard J. Schreiber*, *James L. Howe, III*, and *Steven Reed* were on the brief, for intervenors Atchison, Topeka and Santa Fe Railway, et al. *Charles N. Marshall*, *Hanford O'Hara*, and *Richard W. Kienle* also entered appearances for intervenors Atchison, Topeka and Santa Fe Railway Company, et al.

Stanley W. Foy was on the brief for intervenor Alabama Public Service Commission.

Dennis D. Ahlers was on the brief for intervenor Kansas Corporation Commission. *Donald Low* also entered an appearance for intervenor Kansas Corporation Commission.

David R. Richards was on the brief for *amicus curiae* State of Texas urging reversal.

Before: TAMM and SCALIA, *Circuit Judges*, and SWYGERT,* *Senior Circuit Judge*.

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* Of the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

Opinion for the court filed by *Senior Circuit Judge* SWYGERT.

Dissenting opinion filed by *Circuit Judge* SCALIA.

SWYGERT, *Senior Circuit Judge*: The Illinois Commerce Commission ("Illinois") petitions for review of a decision of the Interstate Commerce Commission ("ICC"). *Ex Parte No. 388* (Jan. 27, 1983), *State Intrastate Rail Rate Authority—Pub. L. 96-448*, 367 I.C.C. 149. The decision certifies the State commission to regulate intrastate rail transportation provided that Illinois agrees to adopt automatically all ICC-ordered exemptions from the Interstate Commerce Act. Illinois contends that the decision to preempt state jurisdiction over exemption of intrastate railroad rate regulation exceeds the ICC's statutory authority and is contrary to the Staggers Rail Act of 1980 ("the Act"). Illinois further contends that the ICC's modification of Illinois' application for certification violates the commerce clause and the tenth amendment of the Constitution. We affirm the ICC's decision.

I

The federal government has long regulated intrastate rail traffic on the theory that such traffic is part of an interstate rail network and can sufficiently affect interstate commerce to permit regulation under the commerce clause of the Constitution. *See, e.g., Houston, E. & W.T. Ry. v. United States (Shreveport Rate Case)*, 234 U.S. 342, 350-53 (1914). Because the federal commerce clause power is plenary, *see California Bankers Ass'n v. Shultz*, 416 U.S. 21, 46 (1974), Congress can invoke this power to preempt State regulation of intrastate rail traffic. *See also Shreveport Rate Case*, 234 U.S. at 350-53. Before 1980, Congress empowered the ICC to preempt State regulation only where an intrastate rate set by the State unjustly discriminated against or imposed an undue burden on interstate commerce, or where the State was dilatory in acting upon a proposed intrastate rate change.

See 49 U.S.C. § 11501 (Supp. III 1979). In 1980, the ICC's preemptive power was expanded considerably by the Staggers Rail Act, Pub. L. No. 96-448, 94 Stat. 1895 (1980) (codified at 49 U.S.C. §§ 10101-11917 (1982) ("Staggers Rail Act" or "the Act"). Whether the ICC acted *ultra vires* or unconstitutionally in its interpretation of its expanded preemptive power is the nub of this appeal.

A. *The Staggers Rail Act*

The purpose of the Act was "to provide for the restoration, maintenance, and improvement of the physical facilities and financial stability of the rail system of the United States." *Id.* § 3. Concerned about the "financial plight" of the railroad industry,[1] Congress concluded that overregulation as well as regulation based on antiquated premises had inhibited growth.[2] Therefore, Congress overhauled the federal regulatory scheme[3] and instructed

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[1] *See* H.R. Rep. No. 1035, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 3979. This financial plight was manifested by an anticipated capital shortfall of between sixteen and twenty billion dollars by 1985 and a poor rate of return on equity when compared to other major modes of transportation. *Id.* at 34-36, 1980 U.S. Code Cong. & Ad. News at 3979-81.

[2] Congress found that while regulation had been essential to prevent the abuse of monopoly by railroads earlier in the century, the competition provided by the rise of other modes of transportation rendered the old regulatory framework antiquated and inefficient. *See* Staggers Rail Act §§ 2(1)-(5). Indeed, a "significant reason" for the decline of the industry was the "inflexibility" of the existing regulation. *See* H.R. Rep. No. 1035 at 38, 1980 U.S. Code Cong. & Ad. News at 3983. Furthermore, regulation, however enlightened, itself adversely affected the ability of railroads to compete with substantially unregulated or deregulated modes of transportation. *See id.* at 115, 1980 U.S. Code Cong. & Ad. News at 4059.

[3] Finding a need for the "modernization of economic regulation of the railroad industry," Staggers Rail Act § 2(9), Con-

the ICC to exempt rail traffic from any regulation where regulation was "not necessary to carry out the transportation policy" of the Act *and* where *either* "(A) the [railway] transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power." Staggers Rail Act § 213 (codified at 49 U.S.C. § 10505(a)).

Congress' findings with respect to the harmful effects of federal regulations were equally applicable to State regulation. *See, e.g.*, H.R. Rep. No. 1035, 96th Cong., 2d Sess. 128-30, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4072-74. Furthermore, Congress found that the dual system of regulation caused delays in the approval of rate changes, which resulted in losses of approximately $400 million in additional revenues. *Id.* at 61, 1980 U.S. Code Cong. & Ad. News at 4006. Therefore, in order to "ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc.," the Act "preempt[ed] state authority over rail rates, classifications, rules and practices." H.R. Conf. Rep. No.

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gress gave the railroads substantially more freedom to set rates. Specifically, the ICC was given jurisdiction to review the reasonableness of rates only where a rail carrier had market dominance and the rate exceeded the applicable revenue-variable cost percentage threshold. *See id.* §§ 201-09; H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 79-80, *reprinted in* 1980 U.S. Code Cong. & Ad. News 4110, 4111-12. In addition, the new regulatory framework "affirmatively encourage[d] railroads to use new marketing practices by permitting contracts between carriers and shippers; permissive limited liability rates; business entertainment expenses; efficient marketing through faster implementation of rates; and premium charges to encourage better car utilization," H.R. Conf. Rep. No. 1430 at 80, 1980 U.S. Code Cong. & Ad. News at 4111-12, and provided for new accounting and reporting systems, *see* Staggers Rail Act §§ 301-03.

1430, 96th Cong., 2d Sess. 106, *reprinted in* 1980 U.S. Code. Cong. & Ad. News 4110, 4138.[4]

Having totally preempted State authority, Congress then restored some of it as a matter of legislative grace. But the extent of the State authority was narrowly circumscribed. First, the States had to apply for federal permission to regulate intrastate rail commerce. If the States convinced the ICC that their proposed regulations were "in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title," then the ICC would "certify" the States. Staggers Rail Act § 214(b) (codified at 49 U.S.C. § 11501(b)(3)(A)). Once certified, the States were empowered to regulate intrastate traffic pursuant to the standards and procedures stated in its application. *See id.* § 214(b) (codified at 49 U.S.C. § 11501(b)(4), (5)).[5]

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[4] The Act preempted State regulation of intrastate rail commerce by stating:

> A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

Staggers Rail Act § 214(b) (codified at 49 U.S.C. § 11501(b)(1)). To the extent that the ICC does not have jurisdiction to begin with—e.g., to the extent that the relevant aspect of intrastate commerce does not cause sufficient interstate effects to be deemed "interstate commerce" within the meaning of the commerce clause—the State does, of course, have plenary power to regulate.

[5] A denial of certification vested the ICC with plenary jurisdiction to regulate the intrastate commerce of the uncertified State. *See* Staggers Rail Act § 214(b) (codified at 49 U.S.C. § 11501(b)(4)). Once certified, a State could not change its certified standards and procedures without the express permission of the ICC. *Id.* § 214(b) (codified at 49 U.S.C. § 11501(b)(5)(B)).

Second, even after certification, the ICC could review, upon petition by a rail carrier, the decision of any State authority for compliance with federal standards and procedures. *Id.* § 214(b) (codified at 49 U.S.C. § 11501 (c)). Third, regardless of any authority granted pursuant to certification, States were absolutely precluded from regulating general rate increases, inflation-based rate increases, and fuel adjustment surcharges.[6]

B. *The Certification Proceedings*

After the Act's passage in October 1980, Illinois and thirty-nine other States applied for certification. The ICC questioned the extent to which many of the States' proposed regulations complied with federal standards and procedures. *Ex Parte No. 388* (April 22, 1981) at 2-4. Nevertheless, in order to comply with the statutory requirement that it act upon a certification request within ninety days of receipt, *see* 49 U.S.C. § 11501(b)(3)(A), the ICC decided to "provisionally certify" the forty States until June 29, 1981. *Ex Parte No. 388* (April 22, 1981) at 7-8. On August 5, 1982, after several extensions of both filing deadlines and provisional certification, the ICC "tentatively" concluded that Illinois' proposed regulations complied with federal standards and procedures. *Ex parte No. 388* (Aug. 5, 1982), 365 I.C.C. 855 (1982).

In its proposal for certification, Illinois stated: "An exemption granted for a class of interstate traffic shall not automatically apply in Illinois." *Ex Parte No. 388*

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[6] "Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission." *Id.* at § 214(b) (codified at 49 U.S.C. § 11501(b)(6)). *Cf. Indianapolis Power & Light Co. v. ICC*, 687 F.2d 1098, 1100 n.2 (7th Cir. 1982) (interpreting meaning of "general rate increases").

(Aug. 5, 1982), 365 I.C.C. 855, 856 (quoting Illinois' First Amended General Order No. 219 at 861). Therefore, if the ICC concluded that a certain class of interstate rail traffic should be exempt from regulation, Illinois would not automatically exempt from State regulation the intrastate movement of that same class of traffic. Rather, Illinois would undertake its own independent examination of whether an intrastate exemption was appropriate. In making this determination, Illinois would apply the criteria enumerated in 49 U.S.C. § 10505, which the ICC also applied in granting or denying the federal exemption. In view of this commitment to the federal criteria and the ability of the ICC to review a State exemption decision that differed from the ICC's decision,[7] the ICC stated its intent to certify Illinois unless public comment persuaded it otherwise. *Ex Parte No. 388* (Aug. 5, 1982), 365 I.C.C. at 857-58.

On September 7, 1982 several railroads operating in Illinois (the "railroads") filed joint comments challenging Illinois' proposed regulations as not in accordance with federal standards and procedures. With respect to exemption procedures, the railroads contended that once the ICC exercised its jurisdiction to exempt traffic from regulation, that decision became a federal standard and procedure from which the States had no authority to deviate. Comments of Railroads Operating in the State of Illinois 17. On January 27, 1983 the ICC adopted the railroads' position and modified the Illinois regulations to require automatic compliance with federal exemptions. *Ex Parte No. 388* (Jan. 27, 1983), 367 I.C.C. 149, 152-54. The ICC stressed that because the exemption statute

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[7] Presumably, a rail carrier aggrieved by the State's exemption decision would invoke the ICC's jurisdiction by petitioning the ICC to review that decision "on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle," pursuant to 49 U.S.C. § 11501(c).

was "such a significant aspect of the Staggers Act, Congress could not have intended the practical problems and inconsistencies that would result from States retaining jurisdiction over classes of traffic exempted nationwide by the Commission." *Id.* at 153. The ICC noted that if State conditions were sufficiently exceptional to warrant retention of intrastate regulation despite the federal exemption, the ICC could restructure the exemption order accordingly. *Id.* at 154. Illinois was "unconditionally certified" to regulate intrastate rail traffic pursuant to its proposed regulations as modified by the ICC. *Id.* at 156.

Two members of the Commission dissented, reasoning that Illinois had complied with federal standards and procedures simply by agreeing to apply federal criteria when considering an exemption. The ultimate exemption decision was merely the result of applying those standards and procedures, not a standard or procedure itself. *Id.* at 154-55 (Simmons, dissenting). Furthermore, there was good reason to have two separate, independent exemption determinations, as "transportation considerations solely within an individual State can be significantly different than those of the Nation as a whole with respect to a particular traffic segment." *Id.* at 155.

Illinois appealed by filing a petition to review the ICC's order on the date it was served. While the ICC modified Illinois' proposed regulations in several respects, Illinois confines its appeal solely to the propriety of the exemption modification. Appellant's Brief at 7. The Alabama Public Service Commission, the Kansas Corporation Commission, and the National Association of Regulatory Utility Commissioners ("NARUC") intervened on behalf of Illinois; the railroads jointly intervened on behalf of the ICC. The State of Texas filed an amicus brief challenging the ICC's order as violative of both federal statute and the Constitution.

II

Although the issue was not briefed by counsel, we note that we have jurisdiction to review the decision below as a "final order" of the ICC. 28 U.S.C. § 2342(5) (1982). In a case arising from the same set of certification proceedings involved in this case, the Eleventh Circuit dismissed for want of jurisdiction an appeal from the ICC order granting Florida "provisional" certification and ordering certain modifications. *Florida Public Service Commission v. ICC*, 724 F.2d 1460 (11th Cir.), *cert. denied*, 104 S. Ct. 1686 (1984). The court reasoned that the ICC had not issued a final appealable order concerning Florida's certification: the order granted only "provisional" certification pending comment and "final certification"; Florida retained jurisdiction to regulate intrastate rates in the interim. *Id.* at 1462.

In the instant proceedings, the ICC indicated that its order was final by "unconditionally" certifying Illinois; the time for considering further amendments or inviting public comment had already passed. The ICC denied Illinois leave to enforce its prior regulations pending further proceedings, but instead, ordered Illinois to modify its regulations to comply with the ICC's decision of January 27. *Ex Parte No. 388* (March 4, 1983). Thus, Illinois was faced with the choice of abandoning intrastate regulations altogether or adopting the regulatory scheme approved by the ICC. Unlike the case before the Eleventh Circuit, here the ICC has determined the "rights or obligations" of the parties, "legal consequences will flow from the agency action," and "judicial review will not disrupt the orderly process of adjudication." *See Florida Public Service Commission*, 724 F.2d at 1462 (quoting *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). In sum, the ICC's decision below is a final, appealable order.

III

Illinois argues that the ICC lacked the statutory power to force it to adopt federal exemptions automatically. Adopting the reasoning of the dissent below, Illinois contends that to comply with federal "standards and procedures," it had only to apply the federal criteria governing an exemption decision; the exemption decision was the result of the application of standards and procedures and was not itself a standard or procedure. Because we do not construe the Act in the first instance, we must first define the standard of review of the ICC's construction.

A. *Standard of Review*

An agency's interpretation of the statute it must administer is ordinarily accorded "great deference." *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 166 (D.C. Cir. 1982) (quoting *EPA v. National Crushed Stone Association*, 449 U.S. 64, 83 (1980)). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *FEC v. Democratic Senatorial Campaign Commission*, 454 U.S. 27, 39 (1981). Of course, agency constructions that are "inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement" must be overturned as unreasonable. *Id.* at 32.

Citing *National Wildlife*, 693 F.2d at 166-70, Illinois contends that this deferential standard should not be applied automatically and that three factors which are present here should persuade us to accord no deference to the ICC: (1) the ICC's construction was not contemporaneous with the statute's enactment, (2) its decision was not unanimous, and (3) its interpretation was inconsistent with prior decisions.

It is true that an agency interpretation of the statute it must administer does not in and of itself necessarily

justify a deferential standard of review and that the factors listed by Illinois, among others, are also considered in determining the extent of deference owed. *See National Wildlife*, 693 F.2d at 167 (citing first and third factors listed above); *cf. Local 900, Int'l Union of Electrical, Radio and Machine Workers, AFL-CIO v. NLRB*, 727 F.2d 1184, 1189 (D.C. Cir. 1984) (noting NLRB's unanimity as a factor in court's decision to grant enforcement). But to define the presence or absence of any of these additional factors as dispositive misreads *National Wildlife*. First, the presence of the first and third factors —contemporaneous and consistency—*heightens* deference. *National Wildlife*, 727 F.2d at 167 & n.31. If those factors were absent, the court would not be justified in according the agency's decision "no deference," as Illinois urges. Rather, to the extent those factors are absent, the deference generally accorded agency judgment will not be heightened still further. Second, because the general rule is to defer to the reasonable statutory interpretations of agencies, Illinois must show compelling reasons for an exception. We are not persuaded by the argument that we should focus on three factual distinctions from *National Wildlife* at the exclusion of considering the many other factors enumerated in that case and in the face of our strong predilection for applying the general rule of deference.

In any event, Illinois is incorrect in arguing that two of the factors it enumerates are absent in this case. As for the third factor, the ICC's interpretation was not "inconsistent" with its prior decisions. There were no prior decisions with which to be inconsistent. While the ICC had preliminarily concluded that Illinois' exemption procedures were acceptable, that determination was only one facet of a deliberative process, not a final decision of any significance. That the ICC was deliberate enough to test its preliminary conclusions by soliciting public comment and open-minded enough to respond to public

comment should be commended, not penalized by according its ultimate judgment less deference. As for the contemporaneousness factor, Illinois ignores that the underlying reason for deferring to agency interpretations contemporaneous with the enactment of a statute is that the interpretation is necessary to set in smooth motion the machinery of a new statute. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965) (quoting *Power Reactors Co. v. Electricians*, 367 U.S. 396, 408 (1961)). While over two years passed before the agency rendered a final interpretation of the statute governing certification, this was nevertheless the first interpretation, and the certification process was as yet "untried and new." *Id.*

In addition, three other factors in this case militate in favor of great deference. The agency interpretation here was "thorough";[8] Congress intended that the ICC's interpretation be given considerable deference inasmuch as it gave the ICC substantial discretion in administering the certification process and in defining federal "standards and procedures,"[9] and the ICC based its ruling on com-

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[8] As in *National Wildlife*, 693 F.2d at 168-69, we find nothing in the record to show that the agency's decisionmaking process has been inadequate in this instance. The ICC's deliberative process began with a determination that the State's proposals required more specificity. When Illinois resubmitted its proposal, the ICC tentatively approved it pending public comment. After reviewing the comments of the railroads, the ICC rendered a final decision that analyzed both the language and policies behind the statute.

[9] The Act provides:

> . . . [T]he Commission shall certify such State authority for the purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State au-

mercial policy considerations that implicated the agency's expertise.[10] *See National Wildlife*, 693 F.2d at 167-70 (thoroughness of agency's reasoning, intent of Congress to grant agency substantial discretion in administering a statute, and extent to which agency's interpretation is infused with the agency's expertise are factors justifying great deference). In sum, Illinois has failed to demonstrate any convincing reason to abandon in this case the general rule that an agency's interpretation of the statute it administers must be accorded substantial deference.

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thority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

Staggers Rail Act § 214(b) (codified at 49 U.S.C. § 11501 (b)(3)(A)). Such a broad delegation of power to the ICC to interpret the standards and procedures required by Title 49 of the U.S. Code indicates that Congress intended the ICC's interpretation of that title to be accorded substantial deference.

[10] The underlying reason for deference to agency interpretations is that agencies possess special expertise. Where the agency's interpretation is based on its scientific expertise or its unique ability to assess the policies with which it must grapple on a day-to-day basis, then the interpretation manifests an expertise to which courts must defer; where the interpretation rests not on policy considerations but on a narrow dissection of statutory language, the courts are equally skilled in making such an interpretation, and reduced deference is owed. *National Wildlife*, 693 F.2d at 169-70.

Here the ICC based its decision on policy considerations: "Based upon the goals of the Staggers Act, the rail transportation policy, and serious practical considerations, we conclude that, once a particular category of traffic is exempted by the Commission, this becomes a standard from which States cannot deviate. . . ." *Ex Parte No. 388* (Jan. 27, 1983), 367 I.C.C. at 152. Because this conclusion required the agency to exercise its expert knowledge of commercial policy, an area in which the agency possesses a comparative advantage vis-a-vis the courts, this court should accord substantial deference to the agency's interpretation.

Intervenor NARUC, however, offers a forceful, but ultimately unpersuasive, alternative reason for not according the ICC's decision substantial deference. Citing *North Carolina v. United States*, 325 U.S. 507, 511 (1945), NARUC contends that where an agency decision preempts State regulation of intrastate commerce, a strict standard of review is required. "A scrupulous regard for maintaining the power of the state" in the field of intrastate commerce "has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates must meet 'a high standard of certainty.' *Illinois Central R. Co. v. Public Utilities Commission*, 245 U.S. 493, 510 [(1918)]." *Id.* Because the ICC's action preempted the State's traditional regulatory power, "justification for the 'exercise of the federal power must clearly appear.' *Florida v. United States*, 282 U.S. 194, 211-12 [(1931)]." *Id.*

NARUC errs in characterizing the *North Carolina* decision as governing the standard of review of agency decisions. Rather, that decision simply enunciated a well-established rule of statutory construction: the "clear statement" rule. That rule provides that a "court cannot find a federal law preempts state regulation of an activity historically regulated by the states, unless Congress has given a 'clear statement' of its intent to preempt." *Texas v. United States*, 730 F.2d 339, 347 (5th Cir. 1984) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)); *see generally* L. Tribe, *American Constitutional Law* § 6-25 (1978). Where an *agency* interprets the statute in the first instance, as is the case both here and in *North Carolina*, the rule simply requires the *agency* to determine that "justification for the 'exercise of the Federal [preemptive] power . . . clearly appear[s].'" *North Carolina*, 325 U.S. at 511. What standard of review to apply to this determination is an entirely separate ques-

tion, about which *North Carolina* is completely silent.[11] We need not decide what that standard of review should be since we find, as the Fifth Circuit did in *Texas*, 730 F.2d at 347-48, that Congress' intent to preempt State power is unmistakable.[12] The Conference Committee stated that the Act "preempts state authority over rail rates, classifications, rules, and practices." H.R. Conf. Rep. No. 1430, at 106, 1980 U.S. Code Cong. & Ad. News at 4138. This is the kind of "clear statement" that overcomes the rule's presumption that Congress did not intend to assert the full measure of its commerce clause and supremacy clause power to preempt State regulations.[13] We hold that great deference is owed the ICC's decision below.

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[11] We therefore disagree with the Third Circuit's suggestion that *North Carolina*, 325 U.S. at 511, requires that ICC orders preempting State regulatory power be subjected to a more rigorous standard of review. *Wheeling-Pittsburgh Steel Corp. v. ICC*, 723 F.2d 346, 351 (3d Cir. 1983). *But see infra* note 12 (an argument can be made, on grounds unrelated to those expressed in *Wheeling-Pittsburgh*, that a rigorous standard of review should be applied to agency findings with regard to the clear statement rule).

[12] Where the reviewing court would reach the same conclusion as the agency reviewed had the court been able to decide the issue in the first instance, the standard of review issue is moot. The standard of review is in essence a measure of the willingness of courts, for a variety of institutional reasons, to defer to the resolution of issues it may have decided differently in the first instance. In the instant case, we agree that Congress clearly stated its preemptive intent, and therefore there is no reason to assess the extent to which we would be willing to affirm an agency decision we disagreed with.

We note, however, that in *National Wildlife*, 693 F.2d at 170, we stated that "deference is not a unitary concept, to be applied with equal force to all issues in a case." Given the comparative competence of the court to assess preemptive intent, it is possible that the "clear statement" issue should be reviewed with less deference than other issues in the case.

[13] The clear statement rule simply requires the agency to presume that Congress intended no preemption. *See* L. Tribe,

We therefore must affirm the order unless the ICC rendered an unreasonable interpretation of the Act.

B. *Reasonableness of the Agency's Interpretation*

The railroads urged the ICC to hold that exemption decisions as well as all other ICC decisions that fix policy are themselves federal standards and procedures that States are bound to apply. Illinois argued that only the criteria used to reach an exemption decision are federal standards and procedures, and, therefore, the States are bound only to apply that criteria in an independent determination of whether to grant an intrastate exemption. The ICC chose a middle course. The ICC reasoned that the Act did not require the States "to follow each Commission regulation and every Commission precedent in all subject matters." *Ex Parte No. 388* (Jan. 27, 1983), 367 I.C.C. at 150. The ICC was concerned, however, that the States comply with the underlying policies of the Act. *Id.* at 151. Because the exemption statute was "such a significant aspect of the Staggers Act," and because continued State regulation would frustrate federal deregulation efforts pursuant to an exemption order, the ICC concluded that an exemption order was a federal

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supra, at § 6-25. That presumption is easily rebutted where Congress expressly states that it intends preemption.

It is true that Congress did return some regulatory power to States that could persuade the ICC to certify their regulations as in compliance with federal standards and procedures. There is no reason to reapply the clear statement rule to the ICC's certification decisions. There can be no question that Congress clearly intended to preempt State authority subject to the ICC's decision, in the exercise of its sound discretion, to certify State standards and procedures. *See supra* notes 4-6 and accompanying text. We agree with the Third Circuit's suggestion, however, that the ICC should clearly state its reasons for denying certification. *See Wheeling-Pittsburgh*, 723 F.2d at 353.

standard and procedure that bound the State regulators. *Id.* at 153. We believe this was a reasonable interpretation of the Act.

We need not review the wisdom of refusing to adopt the railroads' broad interpretation of what constitutes binding "standards and procedures." The only issue before us is whether "standards and procedures" should be interpreted broadly enough to include federal exemptions. We note, however, that two circuits have adopted the broad reading urged by the railroads and that their reasoning would *a fortiori* support our narrower holding with respect to exemptions. *See Wheeling-Pittsburgh*, 723 F.2d 346, 354-55 (3d Cir. 1983); *Illinois Central Gulf R. Co. v. ICC*, 702 F.2d 111, 115 (7th Cir. 1983).

Deregulation and modernization of the regulations that were retained are the ethos of the Act. Congress found that both overregulation and regulation based on antiquated premises had caused the "financial plight" of the railroad industry.[14] The statutory vehicle for deregulation was the exemption process:

> The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other Federal remedies are inadequate for this purpose. Particularly, the conferees expect that as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power.

H.R. Conf. Rep. No. 1430 at 105, 1980 U.S. Code Cong. & Ad. News at 4137.

Here, the ICC found that retention of State regulations despite a federal exemption would defeat the federal

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[14] *See supra* notes 1-4 and accompanying text.

policy of easing regulatory restrictions on the economic behavior of railroads. The ICC recognized that unique State conditions could conceivably justify State regulation despite a federal exemption. But, in the expert judgment of the ICC, such an occurrence would be exceedingly rare and could best be addressed by federal authorities when framing or modifying the federal exemption. *See Ex Parte No. 388* (Jan. 27, 1983), 367 I.C.C. at 154.

In view of the overriding importance of the exemption provisions, it was reasonable for the ICC to conclude that the statute required States to give immediate and automatic effect to federal exemptions. Congressional findings supported the ICC's judgment that continued regulation by States could subvert a federal effort of deregulation through an exemption. Even if the States eventually granted an exemption, the continued application of State regulations in the interim would tax the railroads' resources. Indeed, Congress found that disparate treatment of railroads by federal and State regulations, in particular the delay in rate increases caused by the intervention of State regulation, had in the past cost the railroads $400 million in additional revenue.[15]

Illinois contends that it has a statutory entitlement to render an independent exemption decision. We are unable to discern such an entitlement from either the text or policy of the Act. First, it must be stressed that no State commercial interests are prejudiced by the ICC's decision. The reason that the ICC has jurisdiction to regulate intrastate rail traffic to begin with is that such traffic is part and parcel of a larger system of interstate rail traffic. It is in keeping with the realities of the marketplace to regulate rail traffic as an interstate system; the geographical boundaries of the States in this regard are economically artificial. In considering an exemption, the ICC will give proper heed to intrastate conditions, but in keeping with

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[15] *See supra* text accompanying notes 3-4.

economic realities it will consider those State conditions as only one facet of a cohesive interstate network. This, in addition to the ICC's willingness to modify exemptions to accommodate special circumstances shown by States,[16] persuades us that no legitimate State commercial interests will be prejudiced.

Second, Illinois ignores that it has been preempted from asserting jurisdiction over intrastate rail commerce.[17] To be sure, the House of Representatives rejected an earlier version of the bill that would have completely precluded States from asserting any jurisdiction over intrastate rail rates.[18] Nevertheless, the certification process accords States jurisdiction only as a matter of legislative grace and essentially requires the States to act as regulatory agents of the federal government insofar as they must regulate according to federal standards and procedures.[19] We fail to see how the very limited regulatory role accorded the States justifies an independent State exemption procedure that the ICC has found to frustrate an overriding purpose of the Act: deregulation through the exemption process.

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[16] The ICC noted that if State conditions were exceptional enough to warrant retention of intrastate regulations despite the federal exemption, the ICC could restructure the exemption order accordingly. *Ex Parte No. 388* (Jan. 27, 1983), 367 I.C.C. at 154. The ICC further stated that it would entertain State petitions to so modify exemptions. *Id.*

[17] *See supra* notes 4-6 and accompanying text.

[18] *See* H.R. 7235, 96th Cong., 2d Sess. § 210, 126 Cong. Rec. 18287 (1980). In order to "achieve a better balance between Federal regulation and State regulation," Congressman Broyhill offered an amendment substantially similar to the certification provisions eventually enacted. *See* 126 Cong. Rec. 18298 (1980). The balance struck by Congress, however, accorded the States a distinctly junior role in the regulatory scheme. *See infra* note 19 and accompanying text.

[19] *See supra* notes 4-6 and accompanying text.

Indeed, even if section 214(b) of the Act can be read to confer some entitlement on the part of the States to render an independent exemption decision, we note that the plenary nature of the exemption statute would allow the ICC to exempt railroads from the application of that section—if it made the two necessary findings. Section 213 of the Act allows the ICC to exempt a railroad from the application "of a provision of this subtitle" where that application is (1) not necessary to carry out the transportation policy of the Transportation Title of the U.S. Code and (2) where the rail traffic is of limited scope or where the application of the provision is not necessary to protect shippers from the abuse of market power.[20] The "subtitle" referred to is Subtitle IV, which governs interstate commerce and, of course, includes the certification procedures of section 214.[21]

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[20] Staggers Rail Act § 213 (codified at 49 U.S.C. § 10505).

[21] Congress intended that exemption authority would be invoked frequently and would be applied to a broad range of statutory regulations. *See supra* text accompanying notes 14-15. Congressman Staggers stressed the breadth and importance of the exemption provisions:

> The exemption authority has been carefully drafted to limit regulation to the bare essentials necessary to protect against abuses of market power. It is the intent of the conference committee that *this standard would permit the exemption of any provision in the act,* except as specified in the exemption section.

126 Cong. Rec. 28431 (1980) (remarks of Rep. Staggers) (emphasis added). Therefore, exemption authority is sufficiently plenary to allow the ICC to exempt railroads from the application of certification authority itself.

Of course, one of the findings necessary to support such an exemption is that the provision is "not necessary to carry out the transportation policy" of the Act. Staggers Rail Act § 213 (codified at 49 U.S.C. § 10505(a)(1)). One of the policies of the Act is to "cooperate with the States on transportation matters." *Id.* at § 101(a) (codified at 49 U.S.C. § 10101a(9)). Therefore, in exempting State certification authority, the ICC

In sum, given the importance of the exemption procedures and the support for the ICC's judgment that the smooth and effective operation of those procedures would be threatened by independent State exemption procedures, we hold that the ICC reasonably interpreted the Act when it found that a federal exemption decision is a federal "standard and procedure" to which States must defer. We do not reach the question, thus far addressed by two circuits,[22] of whether all other ICC decisions and rules should also be considered standards and procedures binding on the States.

IV

Illinois and amicus challenge the constitutionality of the ICC's order requiring Illinois to adopt federal exemptions. Specifically, amicus contends that the federal commerce clause power is not sufficiently broad to permit this preemption of State authority to regulate intrastate trade. Amicus and Illinois both contend that the ICC's order circumscribed State sovereignty in violation of the tenth amendment, as interpreted in *National League of Cities v. Usery*, 426 U.S. 833 (1976). We find both contentions to be without merit.[23]

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would have to balance this policy goal against the many other policy goals of the Act—e.g., "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." *Id.* at section 101(a) (codified at 49 U.S.C. § 10101a(1)). Inasmuch as cooperation with the States is not subverted by exempting just one aspect of regulation—exemption hearings—the ICC could probably legitimately conclude that other policy goals of the Act are controlling.

[22] *See Wheeling-Pittsburgh*, 723 F.2d at 354-55; *Illinois Central Gulf R. Co.*, 702 F.2d at 115.

[23] In distinguishing between the constitutional prerogatives of the ICC and Congress, Illinois appears to raise a third constitutional issue: that of overbroad delegation. *See* Appellant's Reply Brief at 9-10. The delegation of authority to the ICC to determine whether State agencies complied with

We agree with the Fifth Circuit that the certification procedures of section 214 of the Act are facially constitutional. *Texas*, 730 F.2d 339. As for the limits imposed by the commerce clause, it is well-established that Congress may regulate intrastate rail traffic where that traffic substantially affects interstate commerce by virtue of its being part of an interstate rail network. *E.g.*, *Shreveport Rate Cases*, 234 U.S. at 350-53; *cf. Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (purely intrastate activity may be regulated by Congress if the cumulative effect of the activity substantially affects interstate commerce). Courts must uphold legislation where there is any rational basis to support Congress' finding that the regulated activity substantially affects interstate commerce and where there is a reasonable connection between the regulatory means selected and the asserted ends.[24] *Texas*, 730 F.2d at 348 (citing *Hodel v.*

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federal standards and procedures was not the kind of "standardless" delegation of power proscribed by principles of separation of powers. *See, e.g., American Power & Light Co. v. SEC*, 328 U.S. 90 (1946). Congress expressly stated that federal standards and procedures must be defined in accordance with the provisions of the transportation title of the U.S. Code. *See* Staggers Rail Act § 214(b) (codified at 49 U.S.C. § 11501(b)(3)(A) ("the Commission shall certify [States] . . . if [it] . . . determines that [the proposed] . . . standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title"). We believe the intricacies of the text and policy of the transportation code provide adequately intelligible standards to guide the ICC in its exercise of delegated power.

[24] Illinois contends that the rational basis test applies only to Congress, not to agencies. Appellant's Reply Brief at 9. Illinois is correct only insofar as it suggests that agencies require "express or implied authorization from Congress." *Id.* But this is a statutory issue that we have already decided. Having concluded that the ICC acted in accordance with the statute, the question then becomes whether Congress had a rational basis for authorizing the ICC's action. In short, Illinois confuses the statutory issue with the constitutional one.

Indiana, 452 U.S. 314, 323-24 (1981); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964)). Here, congressional hearings and investigations produced substantial evidence to show (1) the decline of the railroad industry and (2) the comparative overregulation, by State and federal authorities, of that mode of transportation.[25] It was rational for Congress to conclude that there was a causal connection between the two and to prescribe deregulation of intrastate trade as a cure for the substantial negative effect on interstate commerce. The State certification process was a reasonable means to achieve deregulation. By reforming federal standards and procedures and then requiring States to adhere to them, Congress was able to deregulate on both the interstate and intrastate level.

As for the tenth amendment challenge, that amendment, and the *Usery* holding, are not implicated unless the challenged statute regulates "States as States." *Texas*, 730 F.2d at 353 (citing *EEOC v. Wyoming*, 460 U.S. 226, 237 (1983)). Federal legislation that preempts State regulation of private activities, such as railroads, does not regulate "States as States." *Id.* at 357 (citing *Hodel*, 452 U.S. at 288). Therefore, the tenth amendment is violated only if the State is compelled to administer federal law with respect to the regulated private activity. *Id.* at 356. Section 214 of the Act does not compel States to adopt federal standards and procedures; States have the option to forego any regulation by refusing to petition for certification. *Id.* at 357. Congress could have constitutionally preempted all State regulation of intrastate traffic. We fail to see why the Act should become constitutionally flawed simply because Congress chose to allow the States a narrowly-circumscribed regulatory role. *Hodel*, 452 U.S. at 290 (applying pre-

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[25] *See supra* notes 1-6 and accompanying text. *Accord Texas*, 730 F.2d at 349.

cisely the same reasoning to a similar statutory framework governing surface mining).

Nor have appellants demonstrated any reason for holding section 214 unconstitutional as applied in this case. As for the commerce clause, it suffices to state that defining exemptions as a federal "standard and procedure" was a reasonable means to facilitate deregulation on the federal and State levels. As for the tenth amendment, we see nothing inherent in the intrastate exemption process that makes its preemption a regulation of "States as States."

V

In sum, we hold that (1) the decision below was a final, appealable order; (2) the decision below must be accorded substantial deference and enforced if it was a reasonable interpretation of the Act; (3) the ICC reasonably interpreted the Act when it found that a federal exemption decision is a "standard and procedure" to which States must defer; (4) the certification procedures of the Act are facially constitutional; and (5) the certification procedures as applied here—specifically the modification of Illinois' proposed regulations to require automatic adoption of federal exemptions—were constitutional.

Accordingly, the ICC's order is affirmed.

SCALIA, *Circuit Judge, dissenting*: There may or may not be validity to the ICC's judgment, approved by the majority here, that "continued regulation by States could subvert a federal effort of deregulation through an exemption." Maj. op. at 19. I dissent because I think it not the function of the ICC or of this court to assure that the principal goal of a statute is pursued with maximum efficiency, but rather to assure that it is pursued with that *degree* of efficiency that Congress intended—which may well be less than the maximum, in order to accommodate other interests. The deregulatory provisions of the Staggers Act were a compromise between what is for present purposes maximum efficiency, *i.e.*, total federal preemption, and maximum inefficiency, *i.e.*, continued deferral to traditional state regulation of intrastate carriage. Since the nature of that compromise is best found in the language of the statute; and since that language simply does not bear the meaning the Commission has assigned it; I think today's decision ultimately frustrates rather than furthers the full purpose of the legislation.

The majority facilitates its task by describing the legal situation as follows: "Having totally preempted State authority, Congress then restored some of it as a matter of legislative grace." Maj. op. at 6. This notion of total preemption and cede-back has no basis in reality. The Staggers Act provides that "[a] State authority may only exercise jurisdiction . . . if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle." 49 U.S.C. § 11501(b)(1) (1982). For those states, like Illinois, that submit their proposed regulatory standards and procedures to the ICC for approval, the referenced provisions permit preexisting state regulation to continue unless and until the Commission determines (through the certification procedures) that the state's standards and procedures are not in accordance with the standards and procedures applicable to

interstate regulation. 49 U.S.C. § 11501(b)(2) & (3). This is no total preemption, but merely a limitation upon preexisting, traditional, unpreempted state powers—or, if you will, a *partial* preemption, the scope of which is precisely the question before us. This is the view we recently took in *Utah Power & Light Co. v. ICC*, No. 83-1276, slip op. at 8 (D.C. Cir. Oct. 30, 1984) ("Congress expressly rejected a sweeping federal preemption of the state regulatory role"). It is also the view of the Third Circuit:

> Contrary to the ICC's contention, the legislative history of the Staggers Act indicates that the Act did not fundamentally reallocate federal and state rate-making authority. . . . Rather, it appears that Congress, by rejecting federal preemption of intrastate rates, intended to preserve this traditional sphere of state competence.

Wheeling-Pittsburgh Steel Corp. v. ICC, 723 F.2d 346, 353 (3d Cir. 1983). The majority's only basis for its hypothesis of total preemption is a statement in the Conference Report that "the Act preempts state authority over rail rates, classifications, rules and practices," H.R. Rep. No. 1430, 96th Cong., 2d Sess. 106 (1980). I would agree it preempts: the question is *how far*—totally or only in part? Nothing suggests the former. In short, from both a technical and a practical point of view, what is at issue here is not the scope of a supposed federal cede-back, but the scope of a partial federal preemption.

There is no doubt concerning the manner in which we are to resolve this issue:

> Where . . . the field which Congress is said to have pre-empted has been traditionally occupied by the States, see, *e.g.*, U.S. Const., Art. I, § 10; *Patapsco Guano Co. v. North Carolina*, 171 U.S. 345, 358 (1898), "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the

> clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). This assumption provides assurance that "the federal-state balance," *United States v. Bass*, 404 U.S. 336, 349 (1971), will not be disturbed unintentionally by Congress or unnecessarily by the courts. But when Congress has "unmistakably . . . ordained," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963), that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall.

Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). To depart from that long tradition of interpretation in the present case is particularly inappropriate, because the language at issue was specifically adopted as a compromise between pro- and anti-preemption legislators, who must be presumed to have evaluated the deal with that tradition in mind.

It is worth briefly describing the compromise, since the basic issue here is whether it will be enforced or disregarded. The original House version of the Staggers Act (H.R. 7235, 96th Cong., 2d Sess. (1980)) flatly ousted the states from all jurisdiction over intrastate rates. *See* 126 CONG. REC. 17,793 (1980) (colloquy prepared by Rep. Madigan). Rep. Broyhill, however, introduced an amendment prompted by "great concern expressed by the public utility commission in my State and in others" about the elimination of state jurisdiction. *Id.* at 18,298. The amendment sought to "achieve a better balance between Federal regulation and State regulation," *id.*, by permitting states to continue to exercise jurisdiction over intrastate rates if they applied the rate regulation standards set forth in the Staggers Act and if their proposed regulatory procedures were approved by the ICC as consistent with its own procedures. Rep. Broyhill's amendment was accepted by the majority of the House Committee on Interstate and Foreign Commerce which first reported H.R. 7235, *id.*; with minor alteration, its intent

to preserve state jurisdiction was carried forward to the final House bill, *see* H.R. REP. No. 1430, 96th Cong., 2d Sess. 105-06 (1980), the Conference Committee Report, *id.* at 106, and, as a perusal of 49 U.S.C. § 11501(b)-(c) will confirm, the bill that was ultimately signed into law.

It is, as I have suggested, a betrayal of that compromise to interpret its language on a basis different from that traditionally employed—which presumes the absence of preemption unless it clearly appears. In my view, however, the majority opinion not only fails to apply such a presumption but reaches a result that is wrong even without it. The crucial language, the nub of the accommodation between the federal and state proponents, is the following:

> [E]ach State authority exercising jurisdiction over intrastate *rates, classifications, rules, and practices* for intrastate transportation . . . shall submit to the Commission the *standards and procedures* (including timing requirements) used by such State authority in exercising such jurisdiction. . . . [T]he Commission shall certify such State authority for purposes of this subsection if the Commission determines that such *standards and procedures* are in accordance with the *standards and procedures* applicable to regulation of rail carriers by the Commission under this title. . . . Any rail carrier . . . may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate *rate, classification, rule, or practice* is determined, on the grounds that the *standards and procedures* applied by the State were not in accordance with the provisions of this subtitle. . . . If the Commission determines that the *standards and procedures* were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate *rate, classification, rule, or practice.*

49 U.S.C. § 11501(b)(2), (b)(3)(A), (c) (emphasis added). This text establishes a dichotomy between the

state authority's "standards and procedures," on the one hand—which must conform to those of the Commission—and the carrier "rates, classifications, rules, and practices" approved by the state authority, on the other hand —which need not accord with those approved for interstate carriers by the Commission. The question before us is whether a Commission class-of-traffic exemption—that is, a Commission determination under 49 U.S.C. § 10505 that a particular category of interstate traffic (such as boxcar or export coal traffic) shall be exempt from one or more provisions of the Act (*e.g.*, rate regulation)—constitutes a "standard or procedure" of the Commission. It seems to me obvious that it does not. The whole nature of the dichotomy is that the one element (standards and procedures) is used *in order to determine* the other element (the validity of carrier rates, classifications, rules and practices). A Commission exemption—an exemption from rate regulation, for example—is in no sense a standard by which the validity of a rate is determined, but is rather *the determination itself*, in effect approving all rates for the subject commodity. There will have to be an adjudication, of course, to determine whether a particular shipment comes within the exemption—but the mere existence of some generality in a determination is not alone enough to make it a standard, since the same is obviously true of the carrier "rules" and "classifications" that the Commission approves, which fall on the other side of the dichotomy.

What is meant by a standard is a principle of general application regarding degree of competition, revenue adequacy, service needs or other elements of the national transportation policy which will, when applied to particular facts, determine the legitimacy of railroad behavior. Prototypical examples are the "formulas or procedures" for determining variable costs and the "standards and procedures for establishing [adequate] revenue levels" that the Commission is required to adopt. *See* 49

U.S.C. §§ 10701a(c)(4)(A), 10704(a)(2). To confuse such a standard with an exemption is to call a criterion a conclusion or a test an outcome. Rather than constituting standards, exemptions—in effect automatic approvals of particular carrier activities—are the consequence of the application of standards to the activities in question. The broadest of those standards are set forth in § 10505 itself, which requires the Commission to grant an exemption when the provision in question

> (1) is not necessary to carry out the transportation policy of section 10101a of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a). Subordinate standards further specifying these broad statutory generalities can of course be developed by the Commission. And both the statutory and Commission-developed standards must be applied by the states in their determinations of whether, at the intrastate level, the traffic should be exempt. But the exemption itself is, under no conceivable meaning of the term, a standard.

Though the answer seems to me clear in the present case, I do not pretend that it will always be easy to identify a standard within the meaning of the statutory provisions here at issue. But assuredly that judgment must be made by conducting an inquiry along the lines I have just described, rather than by simply asking, as the Commission and the majority did here: "Will it hamper federal deregulation for the states to fall out of lock-step with regard to this federal determination?"—or actually, even less than that: "Will it hamper federal deregulation to have to assure the necessary degree of lock-step by reviewing state adjudications instead of flatly prescribing a uniform intrastate rule?" An affirmative response to that question proves nothing except that the proponents of de-

regulation were wise in seeking total federal preemption. But they were also unsuccessful.

The majority appeals to the deference we owe to the Commission's judgment. I agree with the proposition, Maj. op. at 12, that we always owe the agency's judgment some deference—even an agency judgment such as this one, reached by a 4-to-2 margin (with the Chairman in dissent) and reversing the agency's initial view of the matter. The only question is whether the deference owed in this case is sufficiently "heightened" to permit such mayhem upon the mother tongue as to call an exemption a standard. The only "heightening" factor discussed in the majority opinion that I think substantial is the fact that "the ICC based its ruling on commercial policy considerations that implicated the agency's expertise," Maj. op. at 13-14 (footnote omitted). It is true that the agency based its interpretation upon the judgment (which it is much more informed than we are to make) that the failure of a state to apply a federal exemption in lockstep would create "practical problems and inconsistencies," would cause "operational and/or marketing difficulties," and would interfere "with the railroads' and shippers' freedom to take advantage of permitted flexibility in doing business under the Staggers Act." *State Intrastate Rail Rate Authority*, Ex Parte No. 388, 367 I.C.C. 149, 153 (1983). If these horribles were envisioned by the Commission with regard to a statutory scheme presumably designed to avoid them, its selection of an interpretation that would, in its expert judgment, achieve that desired result would be persuasive. The problem here is that the presumption is not justified. It is entirely clear that the continuation of state regulation provided in the Staggers Act *will* complicate rail operations and impede deregulation; that is why the proponents of the original version of the legislation sought to eliminate it. The whole purpose of the provisions at issue here was to establish *in what manner*, and thus *to what degree*, it would complicate and impede. The majority has

it precisely backwards, it seems to me, when—in reliance upon the Commission's expertise—it in effect applies a *standard* of "no major complication or impedence" to reach a *conclusion* regarding the meaning of the statutory text. It is the *text* that is the standard, and the degree of complication or impedence that is the *conclusion.*

That is why, for certain areas in which the statutory text would produce a conclusion of more complication or impedence than Congress was willing to accept, the text was suspended and total federal preemption imposed. 49 U.S.C. § 11501(b)(6) provides that "[n]otwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission." It would have been simple to add to this catalogue "exemptions of classes of traffic under section 10505 of this title." That was not done. If it was unnecessary, then one must wonder why it *was* necessary to list "inflation-based rate increases under section 10712." Surely those increases, justified solely by reference to objectively determinable "inflationary cost increases," 49 U.S.C. § 10712(a) (1982), would meet the same test of ipso facto exclusion from state jurisdiction that the Commission applied here: "it is difficult to conceive of a situation where a State should continue regulation . . . where the Commission, based on its own record, and under the same statutory criteria to be used by the States, has already determined that an exemption is warranted." 367 I.C.C. at 153.

The railroads argued before the Commission that *all* ICC decisions on *all* subjects are "standards and procedures" under § 11501(b). The majority claims that "two circuits have adopted [this] broad reading . . . and . . . their reasoning would *a fortiori* support our narrower holding with respect to exemptions." Maj. op. at 18, *citing Wheeling-Pittsburgh Steel Corp. v. ICC*, *supra*, and *Illinois Central Gulf R.R. v. ICC*, 702 F.2d 111, 115 (7th Cir.

1983). I disagree with the characterization of both these cases. To begin with, they both dealt only with the scope of the ICC's power to review state adjudicatory determinations under § 11501(c). I agree that that is plenary—so that if the ICC is indeed correct that the standards it applied in reaching the conclusion of a class-of-traffic exemption for interstate purposes will inevitably produce the same class-of-traffic exemption for intrastate purposes, it will inevitably reverse every state determination to the contrary. But we will be able to review that asserted inevitability *on the basis of the evidence presented in the particular cases*, instead of accepting as a statutory prescription that any exemption valid for interstate traffic applies to intrastate traffic as well. Neither *Wheeling-Pittsburgh Steel* nor *Illinois Central* holds that, *outside the context of a specific adjudication*, the ICC can dictate the application as well as the interpretation of the federal standards used by the state commissions in their intrastate proceedings.

Moreover, even the language of *Wheeling-Pittsburgh Steel* does not support the interpretation suggested by the majority. It does not intimate, much less state, that all Commission conclusions with regard to interstate traffic must be followed with regard to intrastate traffic. To the contrary, it displays a clear awareness that only pronouncements establishing "standards and procedures" have that effect (a condition that was easily met in the case before it, which involved Commission guidelines concerning the manner of computing revenue adequacy and maximum allowable rates). This is clear from the court's statement of its principal holding:

> We hold that the phrase "standards and procedures" in section 11501(c) refers to standards and procedures promulgated and interpreted in decisions and orders of the ICC as well as those standards or procedures expressly incorporated in the Interstate Commerce Act.

723 F.2d at 354-55.

The language of *Illinois Central* (as opposed to its holding) is another matter. It does indeed say that "a discrete reading of the statute requires that consistent rulings of the ICC must necessarily be incorporated and adhered to by state commissions exercising jurisdiction pursuant to the Staggers Act." 702 F.2d at 115. Though the interpretation is not inevitable, I find it difficult to contest the majority opinion's assertion that this was meant to cover *all* rulings of the ICC—inasmuch as the author of *Illinois Central* and the author of the majority opinion are one and the same. It seems to me, however, that the dictum rests upon a misapprehension of the statute's basic dichotomy between "standards and procedures" on the one hand and "rates, classifications, rules and practices" on the other. That is apparent from the *Illinois Central* court's description of the question it thought it had before it:

> The crux of the dispute we must resolve is whether the policy of the ICC to enforce average agreements can be considered a "rule" or "practice" under the Act, thereby requiring conformity by a state railroad commission exercising its authority under the Act.

702 F.2d at 115. Of course the real question was whether the state authority was departing from ICC standards in declining to enforce an average agreement—which would automatically be the case if the ICC's approval of such agreements was *itself* a standard, but could also be the case if it was not but the standards that produced it would yield the same result in the state case. In no event, however, could the ICC policy be a "rule" or "practice" under the Act, since those terms refer not to the decisions, rules or practices of the ICC, but to the rules or practices of the *carriers*. And even if they did refer to the former, one would think they would represent the *opposite* of the ICC "standards and procedures" the states are bound to apply. In other words, the formulation of

the issue before the court would be mildly mistaken if it had used the terms "standard and procedure" instead of "rule or practice," but is incomprehensible as written. The penultimate sentence of the opinion reinforces the impression that the language of the statute had not much to do with the outcome:

> Thus, whether the ICC's insistence in honoring average agreements is considered a "standard," "procedure," or "practice," it should have been applied by the Kentucky Commission.

702 F.2d at 116 (footnote omitted). I therefore do not consider the *Illinois Central* dictum a reliable guide.

As a supplemental argument, the majority asserts that the same exemption provision of the Act that would be used to establish the class-of-traffic exemptions at issue here could also be used to exempt railroads from the provision of the Act that establishes continuing state jurisdiction over them. Maj. op. at 21. The problem with this analysis (apart from the fact that it makes a shambles of the legislative compromise) is that the exemption provision only applies "[i]n a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter," 49 U.S.C. § 10505(a). I interpret this to mean that the matter must relate not merely to the carrier, but also to the transportation in question. *Cf.* 49 U.S.C. § 10501(a) ("Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction *over transportation*—(1) by rail carrier . . . .") (emphasis added). But intrastate transportation is excluded from the jurisdiction of the Commission, *see* 49 U.S.C. § 10501(b)(1), unless the Commission acquires jurisdiction by proper refusal to certify a state regulatory authority under § 11501. *See* 49 U.S.C. § 11501(b)(4)(B). Thus, this imaginative make-weight in the majority's analysis ultimately comes up against the same obstacle that

impedes its principal argument: the necessity of establishing that certification was properly denied, the only asserted basis for which is the proposition that a class-of-traffic exemption is a standard.

* * * * *

It is my impression that, in the long era of expanding economic regulation that preceded the current trend towards disengagement, zealous regulators more than once turned a legislative compromise into an unqualified victory by successfully urging that the limiting text of a statute be interpreted in light of its "broad remedial purposes"—as though there had been only one side in the Congress, or as though prescribed limitations were less important than the prescribed powers which they circumscribed. It may seem to many that turnabout is fair play.

Ultimately, however, the integrity of the process is of supreme importance. Legislative compromise (which is to say most intelligent legislation) becomes impossible when there is no assurance that the statutory words in which it is contained will be honored. Those members of Congress who unsuccessfully oppose a legislative initiative favored by the Executive have every reason to fear that any ambiguity they leave in the statute will be interpreted against their interests by the implementing agency. But they also have every reason to trust that the clear limitations they succeed in imposing will be faithfully observed Those are the rules of the game, and I think they have been violated here. I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1120 **September Term, 1984**

Illinois Commerce Commission
and People of the State of
Illinois

v.

Interstate Commerce Commission
and the United States of
America

BEFORE: Tamm and Scalia, Circuit Judges and Swygert, Senior Judge, U.S. Court of Appeals for the 7th Circuit

ORDER

Upon consideration of the petition for rehearing of intervenor Alabama Public Service Company and the joint petition for rehearing of the Illinois Commerce Commission and the National Associaton of Regulatory Utility Commissioners it is

ORDERED, by the Court, that the aforesaid petitions are denied.

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
For the District of Columbia Circuit
Filed FEB 20 1985

GEORGE A. FISHER
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1120 **September Term, 1984**

Illinois Commerce Commission
and People of the State of
Illinois

v.

Interstate Commerce Commission
and the United States of
America

BEFORE: Robinson, Chief Judge, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

ORDER

The joint suggestion for rehearing *en banc* of the Illinois Commerce Commission and the National Association of Regulatory Utility Commissioners has been circulated to the full Court. A majority of the Judges have not voted in favor thereof. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc,* that the joint suggestion is denied.

FOR THE COURT
GEORGE A. FISHER, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Circuit Judges Bork, Scalia and Starr would grant the suggestion for rehearing *en banc*

United States Court of Appeals
For the District of Columbia Circuit
Filed FEB 20 1985

GEORGE A. FISHER
Clerk

APPENDIX D

Served January 27, 1983

31422

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 388[1]

STATE INTRASTATE RAIL RATE AUTHORITY – P.L. 96-448

Decided January 14, 1983

After review of comments, the Commission, pursuant to 49 U.S.C. 11501(b), certifies the State of Illinois to exercise jurisdiction over intrastate railroad rates subject to certain amendments. Certification is effective for the statutory period of 5 years, commencing on February 25, 1983.

DECISION

BY THE COMMISSION:

Section 214 of the Staggers Rail Act of 1980, Public Law 96-448, 94 Stat. 1895 (Staggers Act) requires the States to adopt standards and procedures for regulation of railroad rates, rules, and practices in accordance with the standards and procedures applicable to regulation of rail

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[1]This report also embraces Ex Parte No. 388 (Sub-No. 7) Intrastate Rail Rate Authority – Illinois.

carriers by the Commission under Title 49 U.S.C. 11501.[2] We must certify a State authority once we determine that its regulatory standards and procedures are in accordance with Federal law. Once certified, a State may apply its approved standards and procedures for a 5-year period commencing on the date of certification. 49 U.S.C. 11501 (b)(4) and (5).

Our notice initiating the basic overview proceeding, Ex Parte No. 388, *State Intrastate Rail Rate Authority — P.L. 96-448,* 45 F.R. 74571 (November 10, 1980), stated our view that the certification procedure should be a simple one. In our January 25, 1982 decision (7 F.R. 5786 (February 8, 1982)), we extended provisional certification to 36 States for a 60-day period to allow each State additional time to submit standards and procedures which confirm the State's intention to exercise its jurisdiction in conformance with Federal law. Several States filed submissions in response to the January decision.

In *State Intrastate Rail Rate Authority — P.L. 96-448,* 365 I.C.C. 855 (1982), we tentatively found that Illinois, through the Illinois Commerce Commission, has satisfied the requirements for certification under existing law.[3] We ordered that comments be filed by interested parties with regard to Illinois within 30 days from the date of service. Subsequently we issued a notice on September 30, 1982 (47 F.R. 44442 (October 7, 1982)) that each State seeking cer-

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[2]The new law also prohibits the exercise of jurisdiction by State authorities over general rate increases under 49 U.S.C. 10706, inflation-based rate increases under 49 U.S.C. 10712, or fuel adjustment surcharges which we may authorize. (49 U.S.C. 11501(b)(6)).

[3]We also suggested that our decisions relating to the Illinois findings might be useful to other States as they prepare their submissions of revised standards and procedures.

tification would be assigned a separate docket number. Illinois has been assigned Ex Parte No. 388 (Sub-No. 7).

The rail carriers operating in Illinois collectively filed detailed comments pointing out specific areas in which they considered the Illinois submission for certification defective and/or contrary to the Interstate Commerce Act. The railroads contend that the Illinois standards and procedures as set forth in the appendix (*Id.* at p. 859), failed to show that Illinois intends to apply Federal law "exclusively" as they allege is required by section 11501(b). It is the railroad's argument that the ony way a State can apply standards and procedures "exclusively in accordance with" the Interstate Commerce Act is to adopt all of the Code of Federal Regulations dealing with freight rates as well as all other Commission decisions which fix policy, standards, and procedures in this area in every instance. We do not agree.

Under 49 U.S.C. 11501(b)(1), "A state authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier * * * if such state authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle." In adding this section, Congress' intent was "to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals." H.R. Rept. 96-1430, 96th Cong., 2d. sess. 106 (1980).

Accordingly, the test we will use in determining whether certification is warranted is whether these objectives sought to be accomplished by Congress in the Staggers Act are thoroughly reflected in State standards and procedures. Our demands of the States in this regard have been substantial, given our numerous requests for additional in-

formation and our reluctance to certify any State until it satisfies the statutory requirements. The list of factors to be addressed in the appendix to our decision in Ex Parte No. 388, served February 8, 1982, reflects our concern that the goals of the Staggers Act be thoroughly addressed and included in State procedures, and reflected in their individual decisions.

At the same time, this does not mean that States have to follow each Commission regulation and every Commission precedent in all subject matters. This would in essence deprive a State of any jurisdiction and/or discretion over intrastate rates, rules and practices. The Staggers Act does not require preemption to that extent. The statutory scheme provides that as long as a State conforms its standards and procedures to the provisions and policy of the Interstate Commerce Act, the Commission may not arbitrarily deny it authority over railroad rates. In this limited sphere, the Commission has recognized that the States possess a degree of discretion.,[4] On the other hand, those State actions which have not given adequate consideration to the essential provisions of the Staggers Act and

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[4]In No. 38696, *Burlington Northern, et al. — Petition for Review of Order of Washington Utilities and Transportation Commission* (not printed), served October 2, 1981 (case decided on other grounds), the Commission noted that it may have been proper for Washington to use the actual tax rate rather than the Commission-preferred statutory tax rate in determining the involved costs of the traffic at issue. Also, in No. 38727, *Illinois Central Gulf Railroad Company — Petition to Review Order of Kentucky Railroad Commission* (not printed), served December 28, 1981, the Commission found that Kentucky's refusal to enforce an average demurrage agreement against a shipper was not contrary to Federal law, even though the Commission generally enforces such agreements.

its underlying policy objectives have been reversed under the expedited appeal allowed by 49 U.S.C. 11501 (c).[5]

Accordingly, in the certification process, we are most concerned that the State's procedures reflect the major concerns of the Staggers Act and that they are not contrary to the new law or thwart its goals. This is contrasted with the railroad's request for a total "lock-step" duplication of our standards in all areas, which is not required. In our opinion, the detailed Illinois procedures meet our fundamental concerns.

In this light, railroad arguments concerning what we deem minor inconsistencies in the Illinois procedures vis-a-vis Commission procedures are generally not persuasive. While the railroads raise a number of legitimate concerns, they are not of the type which would warrant a refusal to certify this State. Moreover, the railroads offer few examples of serious problems that would warrant further delay here. We will require, as we stated in our earlier decision in this proceeding (365 I.C.C. at 856), that Illinois amend rule 31 to conform to our decision in *Reduction of*

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[5]In three significant intrastate coal rate cases, the Commission reversed State decisions where inadequate consideration was given to the involved railroads' revenue adequacy in prescribing maximum reasonable rates. No. 38793 *Petition for Review of a Decision of the Public Service Commission of West Virginia Pursuant To 49 U.S.C. 11501* (not printed), served March 18, 1982; No. 38809, *Louisville and Nashville – petition to Review Decision of Kentucky Railroad Commission* (not printed), served April 15, 1982; and No. 38946 *Petition of Louisville and Nashville Railroad Company for Review of a Decision of the Public Service Commission of Indiana Pursuant to 49 U.S.C. 11501* (not printed), served November 24, 1982.

[6]These include arguments regarding time periods and procedures for certain decisions, certain tariff circular regulations, special docket regulations concerning refunds and the designated body to receive notice upon failure to issue a decision within the 5-month deadline on investigated rate changes.

the Notice Period for Filing Railroad Tariffs (not printed), served December 29, 1980. Beyond that, however, we see no compelling need to complicate further an already complex subject. Should Illinois apply its technical rules in a manner which results in an inconsistency with Federal law, immediate relief is available under section 11501(c) or (d).

In an area of more serious concern, the railroads argue that the Illinois procedures are more stringent than Federal standards regarding criteria to be used in evaluating maximum reasonableness in complaint cases. Specifically, the railroads argue that evidence of noncompensatory and/or marginally compensatory traffic, traffic mix, and efficiency issues of 49 U.S.C. 10707a(e)(2)(C) only apply to rate increases implemented under 49 U.S.C. 10707a (zone of rail carrier rate flexibility). Guidelines for handling this type of evidence in complaint proceedings were recently outlined[7] and we specifically rejected this argument and concluded that the factors listed at 49 U.S.C. 10707a(e)(2)(c) apply whenever the Commission examines rate reasonableness.[8] Accordingly, Illinois' plan is not deficient in this regard.

We now turn to the question of contracts. In First Amended General Order No. 224, Illinois adopted our interim and proposed rules on contracts.[9] While we noted in our prior decision that we considered that this procedure was proper, we cautioned Illinois and other States which

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[7]No. 38754, *Arkansas Power & Light Company, et al. — Petition to Institute Rulemaking Proceeding — Implementation of Long-Cannon Amendment to the Staggers Rail Act* (not pritned), served September 3, 1982.

[8]*Id.* at sheets 11-12.

[9]Ex Parte No. 387 *Railroad Transportation Contracts* at 45 F.R. 73481 November 5, 1980.

relied upon the proposed rules that any difference between these and the final regulations might necessitate changes in an individual States' standards regarding contract rates. The final contract rate rules were served November 4, 1982.[10] Some modifications were made in the final rules, and Illinois must make any necessary changes. Other States should rely upon these final contract rules in making their submissions.

With regard to exemptions, in our prior decision we noted that Illinois indicated that it would still continue to regulate certain intrastate shipments even if this Commission had exempted corresponding interstate shipments, unless Illinois granted its own exemption. We tentatively concluded that section 11501(b) does not appear to require State adoption or endorsement of every Commission exemption, only that the State apply the same section 10505 criteria. However, we sought comment on Illinois' analysis of this relationship between sections 10505 and 11501.

After further review and analysis in the important area of exemptions we find that application of the criteria in 49 U.S.C. 10505 by the States is not enough. Based upon the goals of the Staggers Act, the rail transportation policy, and serious practical considerations, we conclude that, once a particular category of traffic is exempted by the Commission, this becomes a standard from which States cannot deviate, subject to a possible exception discussed below. One major goal and policy of the Staggers Act is to reform and minimize the need for Federal regulatory control over the country's rail system. Section 3(2) of the Staggers Act and 49 U.S.C. 10101a(2). An important means of accomplishing this has been to use the exemption provisions

[10] *Railroad Transportation Contracts,* 367 I.C.C. 9 (1982).

of 49 U.S.C. 10505. The statute is not permissive. It states that the Commission *shall* exempt a person, class of persons, or a transaction or service when specific findings have been made. 49 U.S.C. 10505(a). The exemption provisions were considered an "important cornerstone" of the Staggers Act and Congress intended that the Commission aggressively pursue exemptions from remaining regulation where warranted. See H.R. Rept. 96-1430, 96th Cong., 2d. sess. 105 (1980). See also, *American Trucking Ass'ns* v. *ICC,* 656 F.2d 1115, 1119 (5th Cir. 1981), and citations therein.

Because section 10505, and its underlying policy, is such a significant aspect of the Staggers Act, Congress could not have intended the practical problems and inconsistencies that would result from States retaining jurisdiction over classes of traffic exempted nationwide by the Commission. As an example, a trailer-on-flatcar (TOFC) shipment from Chicago to E. St. Louis, IL could be subject to intrastate regulation,[11] while a TOFC shipment from Chicago to St. Louis, MO only a few miles further, is exempt from all regulation. This would cause unjustifiable operational and/or marketing difficulties for the railroads conducting business for the same class of traffic under both a regulated and unregulated environment. Given the policy noted above, we conclude that Congress did not intend for the continued existence of State regulation that would produce this awkward result — namely, interference with the railroads' and shippers' freedom to take ad-

[11]As of the time of the railroads' comments, the Illinois Commission had not finally ruled on whether the TOFC-COFC exemption granted by this Commission in Ex Parte No. 230 (Sub-No. 5) is applicable in Illinois.

vantage of permitted flexibility in doing business under the Staggers Act.

In the prior decision, we had tentatively concluded that any possible problem caused by Illinois regulating traffic exempted by this Commission could be resolved through the review process available under section 11501(c), where we could determine whether a State properly applied the section 10505 criteria. Based on our prior conclusions, the problem with such an apprroach is that it is difficult to conceive of a situation where a State should continue regulation (especially over large class-of-traffic exemptions) where the Commission, based on its own record, and under the same statutory criteria to be used by the States, has already determined that an exemption is warranted. For example, our major exemptions affecting fresh produce and TOFC/COFC relied upon findings that motor carrier service was available and competitive. Therefore, rail market power and the potential for its abuse was severely limited. The intra- or interstate nature of a movement would not affect this competitive dynamic.

However, there is always the theoretical possibility that, as to a particular exemption, conditions in a State could be unique. Allegations to this effect can be handled through the provisions exemption, in whole or in part, on our own motion, or on a petition by a State, a railroad, a shipper, or any interested person if regulation is required to carry out the rail transportation policy of 49 U.S.C. 10101a.[12] Accordingly, we could, if circumstances warrant, reinstitute regulation of previously exempted matters on either

[12]This may provide more thorough and balance protection than that available (apparently only to railroads) under section 11501(c). Indeed, the section 11501(c) remedy could be quite cumbersome to implement in the context of broad class-of-trafifc exemptions.

a broad (*e.g.*, nationwide) or narrow (*e.g.*, State-by-State) basis. Our approach provides for a clear and simple scheme of State and Federal rail regulation vis-a-vis exemptions, and adds a necessary measure of predictability to State rail regulation. We conclude that this is a reasonable approach and is consistent with the intention of the Staggers Act to review carrier actions after the fact to correct abuses of market power. H.R. Rept. 96-1430, 96th Cong., 2d. sess. 105 (1980).

Because we conclude that a State must follow our exemptions as to rate, classifications, rules, practices, Illinois must make appropriate modifications as to its plan as submitted.

This decision does not significantly affect the quality of the human environment or the conservation of energy resources.

COMMISSIONER SIMMONS, joined by CHAIRMAN TAYLOR, dissenting in part:

I strongly support the decision here to certify the State of Illinois to exercise jurisdiction over intrastate rail transportation. This certification comes after extensive efforts by Illinois to conform its standards and procedures to those established by Congress in the Staggers Act for regulation of interstate transportation. Nonetheless, I dissent from the majority's conclusion that a State cannot be certified unless it adopts all exemptions which have been or will be granted by this Commission. I believe this requirement is inconsistent with the intent of Congress in establishing the certification process.

Section 11501 requires this Commission to certify a State to exercise jurisdiction over intrastate rail transportation if the State's "standards and procedures are in ac-

cordance with the standards and procedures applicable" under the Staggers Act to interstate transportation. The majority concludes that exemption of a category of interstate traffic by this Commission becomes a "standard" for intrastate traffic. The appropriate *standard* for an exemption is, however, found in section 10505, the provisions of which Illinois has already adopted for purpose of intrastate regulation. The exemption of any particular category of interstate traffic by this Commission is the *result* of application of that standard to the facts before us in a particular proceeding. Moreover, the exemptions already granted by this Commission, which under the majority's determination must be applied to intrastate movements, were considered and decided only as they applied to interstate movements.

Our exemption authority under section 10505 is limited to rail transportation subject to our jurisdiction. This jurisdiction includes interstate transportation and, under section 11501(b)(4)(B), intrastate transportation within a State which has been denied certification. Thus, a reading of sections 10505 and 11501 indicates that when a State is granted certification, it obtains primary jurisdiction over intrastate exemptions.

I also see no logical necessity for automatic extension of an exemption found appropriate for interstate movements to the same category of intrastate traffic. The transportation considerations solely within an individual State can be significantly different than those of the Nation as a whole with respect to a particular traffic segment.

The majority's conclusion in this matter appears grounded in part on a fear that States presented with exemption petitions may reach the wrong result. By establishing the State certification process, however, Congress

indicated its intention that the States be allowed to apply their own expertise to intrastate rail issues so long as they acted in accordance with Federal standards and procedures. If the States fail to apply these criteria properly, carriers may seek relief from this Commission under section 11501(c). The decision here would reverse this procedure by forcing Illinois to seek after-the-fact revocation under section 10505(d) of federally-imposed exemptions, if the individual transportation circumstances of that State made the exemption unwarranted. This result frustrates Illinois' legitimate interests in initially determining the appropriateness of an exemption for a category of rail traffic moving solely within its borders.

The majority relies heavily on the practical problems which could result from a situation where individual States retained jurisdiction over classes of intrastate traffic and similar interstate traffic had been exempted by this Commission. Given the congressional determination that States could continue to regulate intrastate traffic under appropriate standards, I cannot conclude that the operational problems noted in the decision justify the majority's action. The potential for such problems is inherent in our Federal system and already exists in those States which have ceased intrastate rail regulation. In these States, an intrastate shipment is exempt from all regulation while a similar interstate movement only a few miles further is subject to regulation by this Commission. If the potential for such results was a primary concern of Congress in enacting the Staggers Act, it would surely have mandated exclusive Federal jurisdiction over intrastate rail movements.

Whether the States should be required to adopt all Federal exemptions has been one of many questions faced by this Commission in the area of State certification. It is

my hope that the majority's resolution of this issue does not signal an intention to preclude any meaningful role for the States in regulation of intrastate rail traffic.

It is ordered:

1. The State of Illinois through the Illinois Commerce Commission is unconditionally certified to assert jurisdiction over intrastate rail rates, classifications, rules and practices, subject to the standards and procedures outlined in *State Intrastate Rail Rate Authority – P.L. 96-448,* 365 I.C.C. 855 (1982), with modifications to provisions concerning rail contract rates, exemptions, and rule 31, as required in this decision. Certification for the statutory 5-year period will begin on February 25, 1983, provided that we are notified by Illinois within that period that it has made the required modifications.

2. Where they have not done so, we order other States to make their revised submissions pursuant to our January 25, 1982 decision by March 14, 1983, with comments from interested parties due on April 12, 1983. States which have already submitted revised standards and procedures in response to the January decision in this proceeding may supplement their filings under the time frames noted above. Provisional certification will continue except where a State fails to meet the deadline for filing final submissions or otherwise notifies this Commission of its intent not to seek certification.

3. Notice of our action will be given to the general public by delivering a summary of this decision to the Director, Office of the Federal Register, for publication.

4. This decision shall be effective on January 27, 1983.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Gilliam, Andre, Simmons and Gradison. Commissioner Simmons, joined by Chairman Taylor, dissented in part with a separate expression.

AGATHA L. MERGENOVICH,
Secretary.

(SEAL)

APPENDIX E

Served August 5, 1982

31396

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 388[1]

STATE INTRASTATE RAIL RATE AUTHORITY – P.L. 96-448

Decided July 28, 1982

The Commission has tentatively concluded that the Illinois Commerce Commission (Illinois) has met the requirements for certification under 49 U.S.C. 11501(b). The Commission will certify Illinois unless an interested person submits comments which show that Illinois should not be certified.

DECISION

BY THE COMMISSION

In our January 25, 1982 decision in this proceeding (47 F.R. 5786, February 8, 1982), we extended provisional certification for 36 States for a 60-day period to allow each of those States additional time to submit standards and procedures which confirm the State's intention to exercise its jurisdiction over intrastate rail transportation in conformance with Federal standards.[1] Upon request, the time for

[1]The decision also noted that 14 States and the District of Columbia did not seek certification and therefore have lost jurisdiction to regulate intrastate rail rates. We asked these States to let us know if they wished us to assume jurisdiction over intrastate rail transporta-

compliance was subsequently extended for an additional 120 days (to August 8, 1982).

Several States have filed submissions in response to the January decision. We tentatively find that the State of Illinois, through the Illinois Commerce Commission (Illinois), has met the requirements for certification. Before we certify Illinois, however, we believe that interested persons should be given an opportunity to comment. Under the existing schedule, comments are not due until September 8, 1982. In the case of Illinois, it appears unnecessary (and perhaps counterproductive to the overall Ex Parte No. 388 process) to delay processing until after September 8. We will therefore advance the time for filing comments to the Illinois submission and will delay granting 5-year certification until the comment period set in this decision has run and comments have been considered.

While we tentatively conclude in this decision that the Illinois standards and procedures are in compliance with Federal standards and procedures, several areas merit at least brief discusison. Because this decision and the Illinois submission itself may be useful to other States and other parties, we are including the Illinois package as an appendix to this decision.

Discussion

1. *General contract rules.* — In First Amended General Order No. 224, Illinois has adopted our interim and pro-

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tion. Six States (California, Connecticut, Delaware, Mississippi, Nevada, and North Carolina) have asked us to assume jurisdiction over intrastate rail traffic within their borders. In our decision of May 4, 1982, we announced our assumption of this jurisdiction. We will not assert jurisdiction over intrastate rail rates in the other States (Alaska, Arizona, Hawaii, Maine, Massachusetts, Rhode Island, South Dakota, and Vermont) or in the District of Columbia.

posed rules on contracts issued in Ex Parte No. 387 *Railroad Transportation Contracts,* in 1980 (45 F.R. 73481, November 5, 1980). Despite the fact that the effect of these interim rules was subsequently stayed (45 F.R. 85640, December 29, 1980), and remains stayed, we believe it is proper for a State to pattern its contract rules on those developed thus far by the Interstate Commerce Commission in Ex Parte No. 387. At the same time, however, we caution Illinois, and other States which rely on our proposed regulations in Ex Parte No. 387, that any differences between our final regulations and the proposed rules might necessitate changes in the State's approach to intrastate rail regulation, even after the State has been certified. This is true not only for the contract rules, but in all other areas as well.[2] For example, where a State acts on an intrastate rail rate matter in a manner that is consistent with Federal law (as embodied in statute or rule) at the time of the State's action, but where there is a subsequent change in the Federal statute or rule, the Interstate Commerce Commission may grant a railroad's request for relief under 49 U.S.C. 11501(c). See No. 38809, *Louisville and Nashville — Petition to Review Decision of Kentucky Railroad Corporation* (not printed), decided April 13, 1982.

2. *Relationship between interstate and intrastate exemptions.* — In First Amended General Order No. 219 (page 861) Illinois says:

> Illinois may undertake an exemption proceeding either on its own motion or upon petition from any interested party. An exemption

[2]Rule 31 in Illinois Tariff Circular No. 3 is inconsistent with existing I.C.C. rules (49 CFR 1300.54 is no longer applicable, see 46 F.R. 1324, January 6, 1981), and with 49 U.S.C. 10762. Illinois should take appropriate action to eliminate the inconsistency. This minor, technical issue does not, however, warrant disapproval of Illinois' submission.

granted for a class of interstate traffic shall not automatically apply in Illinois. Each exemption initiative shall be considered individually, in accordance with the provisions of General Order No. 225.[3]

We seek comment on this analysis of the relationship between sections 10505 and 11501. In First Amended General Order No. 225, Illinois reiterates its position that it will continue to regulate intrastate shipments in Illinois even if the Interstate Commerce Commission has exempted corresponding interstate shipments, unless the State grants its own exemption. Section 11501(b) does not appear to require State adoption or endorsement of every ICC exemption. The requirement for certification is that the State apply the same section 10505 criteria. The Illinois plan clearly indicates that it will do so (page 889). Also, should a State decide not to exempt intrastate traffic corresponding to interstate traffic exempted by the Interstate Commerce Commission and take action for which a railroad petition under section 11501(c) lies, the Commission will be in a position to review the State's decision not to exempt and will undertake the review on a case-by-case basis. We would in those circumstances at the very least consider whether the State properly applied the standards of section 10505.

Recognizing that we may have an opportunity to review a State's failure to follow an interstate exemption, we conclude that the Illinois position that it will not automatically follow an interstate exemption is not a bar to certification. However, for the benefit of other jurisdictions, we add that a State's commitment to follow our ex-

[3]Although Illinois refers here to "General Order No. 225," the apparent intent is to refer to "First Amended General Order No. 225." General Orders No. 219 through 225 have been repealed and replaced by First Amended General Orders No. 219 through 225. We will therefore construe any reference in this submission to a general order as being to the corresponding amended general order.

emptions completely is also acceptable, although a State would still need to consider, as Illinois has done, the possibility of granting its own exemption under the standards of section 10505 even in the absence of an interstate exemption.

3. *State transportation policy.* — In its enumeration of considerations regarding whether to investigate a railroad's rate filing under 49 U.S.C. 10707a, Illinois, at page 868, refers to "*state* and national transportation policy." [Emphasis added]. This sort of reference is not improper, as long as State transportation policy is consistent with national transportation policy. In the case of Illinois, the reference is acceptable, since the Illinois First Amended General Order No. 219 includes the following at page 219-1:

> [I]t shall henceforth be the policy of the Illinois Commerce Commission to regulate railroad matters in a manner consistent with the standards and procedures set forth by Congress in the Interstate Commerce Act.

On the basis of this statement, we will consider Illinois State transportation policy to be equivalent to national transportation policy wherever that term is used in the Illinois submission.

4. *Zone of rate flexibility.* — In section VII of First Amended General Order No. 221, at page 868, Illinois has included some potentially ambiguous language. The parenthetical on line 15 of paragraph "(a)" refers to a ratio of "190% after October 1982." The State's apparent intent here is to comply with 49 U.S.C. 10707a(e)(2)(A) and 10709 (d)(2). In view of this intent, the parenthetical should be understood to mean "190% on and after October 1, 1982."

PROCEDURAL SCHEDULE

We intend to certify the Illinois Commerce Commission subject to the clarifications made in this decision, unless an interested person, through evidence or argument submitted by September 7, 1982 (a) shows how the Illinois standards and procedures are deficient or (b) otherwise shows why Illinois should not be certified. We intend to issue a final decision relating to Illinois certification soon afterward.

Because the present decision and our final decision on Illinois certification could be useful to other States and persons, the deadline for other States to submit revised standards and procedures is extended indefinitely. We intend to require other States to make their submissions within 45 days after service of our final decision on Illinois. Comments on these submissions will be due 30 days later. Actual due dates will be set either in conjunction with a final decision on the Illinois plan or in such further notice as may be appropriate. The States besides Illinois which have submitted revised standards and procedures in response to our January decision may supplement their filings at that time. Until a final certification decision is reached for each State, provisional certification will continue, unless a State fails to meet the deadline for filing submissions or otherwise notifies this Commission of its intent not to seek certification.

A copy of this decision will be served on the Governors, public service commissions and the transportation committee in the legislatures of each State. It will also be available for inspection in the Office of the Secretary, Interstate Commerce Commission. Notice of this decision will also be provided by Federal Register publication.

This decision does not significantly affect the quality of the human environment or conservation of energy resources.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison.

AGATHA L. MERGENOVICH,
SECRETARY.

(SEAL)

365 I.C.C.

APPENDIX F

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On its own motion	: :	
Adoption of First Amended General Orders 219 throught 225 implementing the Staggers Rail Act of 1980. Repeal of General Orders 219 through 225.	: : : : :	82-0331

RESOLUTION

By the Commission:

WHEREAS, Section 11501 of the Interstate Commerce Act, as amended by the Staggers Rail Act of 1980, requires that states become certified by the Interstate Commerce Commission in order to retain jurisdiction over intrastate rail rates, classifications, rules and practices; and

WHEREAS, it is in the public's interest for this Commission to retain jurisdiction over railroad rates, classifications, rules, and practices and thereby ensure continuation of the regulatory protections traditionally afforded railroads, shippers, and the public at large; and

WHEREAS, certification is contingent upon a state bringing its standards and procedures into conformity with the provisions of the Interstate Commerce Act as amended by the Staggers Rail Act of 1980; and

WHEREAS, failure to adopt the provisions of the Staggers Act will result in the Illinois Commerce Commission losing jurisdiction over railroad rates, classifications, rule and practices; and

WHEREAS, Section 10(c) of the Illinois Public Utilities Act provides that the Commisison may conform its rules, regulations, orders and decisions to the standards and procedures of the Interstate Commerce Act, as amended by the Staggers Act of 1980; and

WHEREAS, the Commission believes that uniform state regulation of railroads is desirable to protect the public interest; and

WHEREAS, Ex Parte No. 388, which was published in the Federal Register on February 8, 1982, implemented Section 11501 of the Insterstate Commerce Act and required the states to submit their standards and procedures by April 9, 1982; and

WHEREAS, General Orders 219 through 225 were adopted by the Commission on March 25, 1982 and constitute the Commission's standards and procedures for regulating railroad rates and practices in conformance with the Staggers Rail Act of 1980; and

WHEREAS, General Orders 219 through 225 were submitted to the Interstate Commerce Commission on March 26, 1982; and

WHEREAS, the Interstate Commerce Commission has directed the Illinois Commerce Commission to make specific revisions in General Orders 219 through 225; and

WHEREAS, the attached First Amended General Orders 219 through 225 incorporate the revisions mandated by the Interstate Commerce Commission;

WHEREAS, the Commission's possible loss of jurisdiction over railroad rates, classifications, rules, and practices constitutes a threat to the public interest.

NOW, IT IS THEREFORE RESOLVED that First

Amended General Orders 219 through 225 be adopted through the emergency rulemaking provisions of the Illinois Administrative Procedure Act.

IT IS FURTHER RESOLVED that proposed rulemaking be initiated for First Amended Orders 219 through 225 pursuant to the provisions of Section 5.01 of the Illinois Administrative Procedure Act.

IT IS FURTHER RESOLVED that General Orders 219 through 225, adopted by peremptory rulemaking on March 25, 1982, be repealed pursuant to provisions of the Illinois Administrative Procedure Act.

Adopted by the Commission this 12th day of May, 1982.

Chairman

TEXT OF EMERGENCY RULE

Rules, regulations and requirements of the Illinois Commerce Commission relating to railroad rates under the provisions of Section 10(c) of the Illinois Public Utilities Act.	:	First Amended General Orders No. 219 under the Illinois Public Utilities Act

I. *Policy*

Public Law 96-448, "The Staggers Rail Act of 1980," requires the states which wish to retain jurisdiction to bring their standards and procedures for regulating railroad rates, classifications, rules and practices into conformity with the Interstate Commerce Act. It is the intent of Congress that railroad companies receive adequate revenues through regulatory encouragement of modal competition, rate flexibility, and relaxed rate reasonableness standards.

Mindful of this Commission's obligations to safeguard the public's interests, it shall henceforth be the policy of the Illinois Commerce Commission to regulate railroad matters in a manner consistent with the standards and procedures set forth by Congress in the Interstate Commerce Act.

II. *Standards and Procedures*

The Staggers Act requires the states to adopt uniform standards and procedures for regulating railroad rates, rules and practices which are in accord with the provisions of the Act. This and the following General Orders constitute Illinois' revised approach to railroad regulation. The standards and procedures included in General Orders 219 through 225 supersede any previous rules or regulations to the extent that the previous rules or regulations might be in conflict with them.

Illinois may undertake an exemption proceeding either on its own motion or upon petition from any interested party. An exemption granted for a class of interstate traffic shall not automatically apply in Illinois. Each exemption initiative shall be considered individually, in accordance with the provisions of General Order 225.

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Rules, regulations and requirements of the Illinois Commerce Commission relating to the exemption of rail carrier transportion under Section 10(c) of the Illinois Public Utilities Act.	:	First Amended General Order No. 225 under the Illinois Public Utilities Act

The following rules are prescribed by this Commission relating to the exemption of rail carrier transportation under Section 10(c) of the Public Utilities Act.

I. *Retention of Jurisdiction.*

From time to time the Interstate Commerce Commission, pursuant to 49 U.S.C. Sec. 10505, may exempt certain classes of rail traffic from interstate regulation.

To the extent that such traffic is also regulated in Illinois on intrastate shipments, such traffic shall continue to be regulated by the Illinois Commerce Commission.

II. *Exemption Proceedings.*

Following an exemption decision by the Interstate Commerce Commission, the Illinois Commerce Commission may initiate a proceeding, either upon its own motion or upon petition, to evaluate feasible changes in Illinois intrastate regulation which might be consistent with Interstate Commerce Commission regulation.

This Commission may, in addition, conduct exemption proceedings, initated either upon its own motion or pursuant to a petition, to consider the exemption of traffic which has not been considered by the Interstate Commerce Commission.

The process of considering exemptions shall be through notice and hearings as provided for in section 60 of the Illinois Public Utilities Act. If, after a hearing or hearings on a proposed exemption, the Commission decides the issues warrant further study, it shall initiate rulemaking in accordance with Section 5.01 of the Illinois Administrative Procedure Act.

III. *Consideration of Evidence.*

In deciding whether or not to initiate an exemption proceeding the Commission shall consider, among other factors, whether the Interstate Commerce Commission has exempted the same class of traffic and whether sufficient data will be available to permit the Commission to render a reasonable decision.

The Commission shall exempt a person, class of persons, or a transaction or service when it finds that further regulation –

(a) is not necessary to carry out state and national transportation policy; and

(b) either (1) the transaction or service is of limited scope, or (2) further regulation is not needed to protect shippers from the abuse of market power.

The Commission may specify the period of time during which an exemption granted pursuant to this General Order is effective. The Commission may revoke entirely or in part an exemption which it has previously granted if it

determines that such action is necessary to carry out state and national transportation policy.

APPENDIX G

SERVICE DATE
FEB 8 1982

INTERSTATE COMMERCE COMMISSION

DECISION

Ex Parte No. 388

STATE INTRASTATE RAIL RATE AUTHORITY – P.L. 96-448

Decided: January 25, 1982

The Commission has decided to extend for a short period the provisional certification of 36 States seeking to exercise jurisdiction over intrastate railroad rates under Section 214 of the Staggers Rail Act of 1980. However, if a State fails to file revised standards and procedures addressing in greater detail its ability and intent to exercise jurisdiction in conformance with Federal law within 60 days of notice of this decision in the Federal Register, its provisional certification will automatically expire.

BACKGROUND

We instituted this proceeding to implement Section 214 of the Staggers Rail Act of 1980, P.L. No. 96-448. Section 214 requires the States to apply to us for certification of their standards and procedures for rate regulation in order for them to retain jurisdiction over intrastate railroad transportation. The Interstate Commerce Act requires States exercising this jurisdiction to do so consistent with Federal law.

In our notice initiating this proceeding [45 Fed. Reg. 7457 (November 10, 1980)], we requested the States to submit sufficient information to permit us to conclude that each State intended timely to exercise its jurisdiction

consistently with Federal law. We explained that we did not expect the States to submit unnecessarily detailed or complicated proposals reiterating the provisions of the statute. At the time, we anticipated no serious problems in implementing the Staggers Act certification procedures.

By the statutory deadline, January 29, 1981, 40 States filed for certification. All expressed their intention to follow the standards and procedures of the Interstate Commerce Act, as amended by the Staggers Rail Act. However, apparently due to the broad nature of our notice, the States did not clearly indicate how they would turn their intentions into standards and procedures which conform to Federal law. In fact, in several instances there were clear conflicts between State and Federal standards. See Ex Parte No. 388, *State Intrastate Rail Authority - P.L. 96-448,* 364 I.C.C. 881, 882 (1981). Nevertheless, we did not seriously question the State's sincerity in seeking certification, and we recognized difficulties in conforming to the changes required by the Staggers Act.

In our April 7, 1981 decision in this proceeding [46 Fed. Reg. 23335 (April 24, 1981)], we provisionally certified 40 States but required each State to file additional evidence regarding its standards and procedures. We have examined the States' subsequent filings and coments by other parties and find new, serious issues of substance and procedure.

We are concerned that our earlier notices, because of their general nature, may not have provided sufficient guidance. Indeed, we may have led the States to conclude that broad statements of intent to comply (accompanied by references to proposed implemednation of key statutory provisions) were all that were necessary.

Our experience with petitions filed by the rail carriers

under 49 U.S.C. 11501(c), and our review of the submissions and comments in this proceeding, have convinced us that more detailed guidance would be appropriate. More thorough explanations of State practice and procedure are necessary. Certain of the State submissions indicate a lack of in-depth understanding of the Federal scheme of regulation. This lack of understanding is troublesome. Once certified, a state may apply its standards and procedure for a 5-year period commencing on the date of certification. 49 U.S.C. 11501(b)(4) and (5). The Act is silent as to whether and on what terms a certification may be revoked before the expiration of the 5-year period. Moreover, under the Act the Commission is to be the final arbiter of State action. Section 11501(c) provides only 30 days to decide a railroad petition for review of a State's final order determining the lawfulness of an intrastate rate, classificaiton, rule or practice. Many of these petitions can be expected to involve complex legal and costing issues. Under these circumstances, it is imperative that we assure ourselves that the States are properly able to administer Federal law before we certify them.

While the most recent state filings are deficient in certain respects (discussed in detail below), we are continuing the provisional certification of 36 States. This provisional certification will expire for any State not filing with us its revised standards and procedures within 60 days. Four States — Maine, Mississippi, North Carolina, and Rhode Island — have indicated they no longer wish to regulate intrastate rail transportataion and are not included in this continued provisional certification.

If in the past we have been insufficiently clear, to the extent possible we have made every effort in this decision to remove all ambiguity and to provide guidelines. We expect

that those States desiring certification will be equally clear and complete in their responses.

PRELIMINARY MATTERS

A number of general issues warrant attention prior to discussing individual requests for certification.

1. South Dakota submits that neither it nor the Commission may regulate rail rates within its borders. South Dakota deregulated its intrastate rail transportation prior to enactment of the Staggers Act and has not sought certification. It notes that 49 U.S.C. § 10501(b)(1) provides that the Commission is without jurisdiction to regulate wholly intrastate transportation except as expressly provided elsewhere in the Act. It reads Section 11501(b)(4)(B) as authorizing Commission regulation of intrastate transportation only where a State has unsuccessful applied to the Commission for certification of its own regulatory authority. From this, South Dakota argues that regulation by the Commission may be substituted for regulation by a State only where that State seeks to regulate intrastate rates but is denied certification. The result of this analysis would be no regulation of intrastate rates in South Dakota.

We agree with this position. We believe Congress, in enacting the Staggers Act, did not intend to extend regulation particularly where it is neither sought nor desired. Were we to regulate rates in a State which had neither regulated in the past, chose not to do so in the future, or had not applied for certification, we would be contravening the intent of Congress.

We do not believe we should be imposing regulation where none existed or where a State does not wish it. We, therefore, have concluded that — where a State has not

regulated or has deregulated rail intrastate transportation, did not seek certification, and does not wish to regulate — we may not exercise jurisdiction over its intrastate rates. However, where a State seeks to have the Commission regulate intrastate transportation, we will accede to the State's request without requiring the State to go through the exercise of filing an intentionally deficient request for certification. Where a State has sought certification and has been denied, we are required by statute to regulate its intrastate rates. If the State does not wish our regulation, it must so notify us. Notice of a desire to abandon intrastate rate regulation will supersede our denial of certification, and we will refrain from regulating the rates within its borders. Where a State has sought certification and has been provisionally or fully certified but then decides to abandon regulation, it must inform us whether or not it wishes us to regulate its intrastate rates. No barriers will be erected to inhibit a State from requesting the institution or termination of our regulation of intrastate transportation, regardless of whether a State is reversing a former position.

2. In the preceding section, we have concluded that a State may choose to have its intrastate rail transportation go unregulated. Consistent with that approach, we believe that if a state chooses to regulate intrastate transportation, it should be permitted to determine the level of regulation it will engage in, so long as the federal scheme of regulation is regarded as the maximum level of regulation that may be imposed on intrastate rail operations. For example, a State may increase the burden on protestants, reduce notice periods for rate changes, or increase the market dominance thresholds if it determines that this level of regulation is more consistent with its regulatory ability

and/or is sufficient to protect shipper interests within the State.

3. Many States indicated their intention to commence proceedings under Section 229 of the Staggers Act. Under that section, an existing rate had to be challenged by a complaint filed within 180 days (i.e., March 30, 1981) of the effective date of the Act (October 1, 1980). A question has been raised as to whether the States may handle these cases. It is argued that, as Section 229 is not part of the Act itself and the States are to regulate according to the Act, there is no authority for intrastate Section 229 cases. We disagree.

If the States are to administer the other Staggers Act provisions, intrastate base rates must be reasonable. By enacting Section 229, Congress recognized that some rates then in effect (including some intrastate rates) might not have been reasonable. Section 229 thus afforded shippers a mechanism to test base rates, and we do not believe that Congress intended to insulate intrastate base rates from such challenge.

Complaints under Section 229 were required to be filed within 180 days or enactment of the Staggers Act, and in our view that limit applies to intrastate base rate challenges as well. Therefore, the States may decide those intrastate base rate complaints that were filed by March 30, 1981. Moreover, many shippers protected themselves by filing such complaints both with us and with States. We will dismiss those complaints filed both with us and with the States; the States should decide them in the first instance. Those intrastate complaints which were filed only with us will be sent to the appropriate States for disposition.

We have also been requested to conduct joint hearings with the States where related inter- and intrastate rates have been challenged. Unfortunately, we lack the staff and financial resources to do so.

4. Section 11501(d)(1)(B) provides that, upon application, the Commission has exclusive authority to prescribe an intrastate rail rate when a State does not act finally on a rate change by the 120th day afer it was filed.[1] Yet, Section 207 of the Staggers Act directs that investigation and suspension proceedings must be completed within 5 months after the rate was to become effective. (An extension to 8 months is also available.) The States generally propose to be governed by the timing requirements of Section 207 rather than the 120-day period. That is, all investigations or suspensions of rates undertaken by the States consistent with substantive Federal law would be disposed of within 8 months of the original proposed effective date of the rate.

Generally, we agree that the States are bound by the same statutory limits that apply to our disposition of complaints, 49 U.S.C. 10327, and investigation and suspen-

[1]A literal reading of Section 11501(d)(1) might lead to the conclusion that exclusive jurisdiction rests with the Commission automatically upon a State's failure to act by the 120th day. Subparagraph (d)(2), however, indicates that such jurisdiction vests only upon application to the Commission. This interpretation becomes clear upon examination of the predecessor provision – 49 U.S.C. §13(5) (1976) – which provided that "[t]he Commission shall have exclusive authority, *upon application to it,* to determine and prescribe intrastate rates if" the requisite conditions are met. (Emphasis supplied.) Former 49 U.S.C. §13(5) was restated as (former) 49 U.S.C. §11501(b) by the Act of October 17, 1978, Pub. L. 95-443, 92 Stat. 1337. Section 3(a) of that act explicitly provided that the restatement "may not be construed as making a substantive change in the laws replaced." 92 Stat. 1466. Section 214(b) of the Staggers Act merely redesignated (former) Section 11501(b) as (current) Section 11501(d).

sion proceedings, 49 U.S.C. 10707. Thereafter, we have 30 days from filing to decide a railroad petition to review a State's final order. An exception to this approach is carved out in 49 U.S.C. 11501(d) which applies in instances where a carrier "files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce . . ." In these limited circumstances, we are required to accept jurisdiction after 120 days if a State instituted a proceeding to review the lawfulness of a tariff matter designed to equalize disparate interstate and intrastate rates on the same traffic, and a carrier has applied to us for an intrastate rate prescription because the State has not acted with finality on the change by the 120th day after it was filed. We will then prescribe a rate consistent with (1) the standards of 49 U.S.C. 11501(a) and 10701 et seq., and (2) the time frames of 49 U.S.C. 10707.

THE CERTIFICATION REQUESTS AND COMMENTS

We find that additional information is necessary to certify unconditionally the States who have requested it, and we will give the States an opportunity to provide this information. As explained above, we will be specific in the type of information we require to avoid the problems we have seen to date. Accordingly, the following sections of this decision clarify what we wish to receive from the States, together with concrete examples of the problems we see in their current submissions. The outline in the appendix to this decision is intended to provide the States with further guidance in the reformulation of their submissions. It is important to recognize, however, that the appendix may not cover all of the necessary substantive areas. We offer it

in a spirit of cooperation and in an effort to remove past ambiguity; it is not intended for total reliance or for use as the outline for subsequent submissions.

One widespread deficiency in the filings was a lack of information regarding State procedures. Although the Act requires the submission of both *standards* and *procedures,* only Texas and West Virginia recognized the importance of *procedures* and discussed them in detail. (While West Virginia submitted a copy of its rules of practice, its rules were adopted before the Staggers Act; they do not explain how West Virginia proposes to implement that Act and do not integrate procedures with standards.) Thus, we stress the importance of the States including an integrated explanation of their procedures as well as their standards in their next filings.

Basically, the submissions may be divided into 3 groups: (1) those that merely adopt the Staggers Act or otherwise contain only very general statements; (2) those that include considerably more details as to standards; and (3) those which stress how procedure affects substantive regulation (i.e., Texas).

1. *States which merely adopted the Staggers Act.* Colorado, Florida, Idaho, Illinois, Indiana, Louisiana, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Washington, Wisconsin and Wyoming have submitted very general statements doing little more than adopting the Staggers Act. Some of these statements refer to certain limited statutory provisions, such as the 20-10 day notice requirement for rate increases and decreases. However, these submissions tell us nothing, for example, about whether the State would suspend on its own motion or only upon protest after the protestant has made the re-

quisite showing under 49 U.S.C 10707. They fail to demonstrate an understanding about key statutory provisions such as jurisdictional levels, the various burdens of proof, or the necessity for finding market dominance before prescribing maximum reasonable rates. They are silent on standards for prescribing rates, as well as the treatment of contract rates and recyclable materials. For the most part, these submissions evince no awareness of the exemption authority, surcharges and joint-rate cancellations, treatment of distinct rail services and the law governing discrimination, rate flexibility, or the promotion of revenue adequacy. Most of these submissions do not even acknowledge that the States have lost jurisdiction over general rate increases, inflation-based rate increases, and fuel adjustment surcharges. In addition to these omissions, some States have compounded the problems by adopting provisions that are directly contrary to Federal law.

Colorado, Florida, Oregon, Utah and Washington, for example, require extensive cost and other evidentiary prejustification of all rates filed. This violates the rail transportation policy of 49 U.S.C. 10101a which is directed at reducing regulatory control. It also stifles innovation and contravenes the spirit of 49 U.S.C. 11701a, which is intended to encourage rate flexibility. That Section provides that, unless a rate specifically violates a particular provision of the Act, "a rail carrier . . . may establish any rate for transportation or other services provided by the carrier." (emphasis supplied). Absent a compelling showing that it would be consistent with Federal law, a State may not require a carrier to prejustify rates. The party opposing the rate must demonstrate that it may violate a provision of the Act before the proponent can be expected to defend it. See 49 U.S.C. 10707. Utah forbids

refiling for a year once it has ruled upon the lawfulness of a rate. There is no similar Federal provision.

Florida, Illinois, Michigan, Washington, Wyoming and Oregon purport to be able to suspend on their own motion, a power denied this Commission. See 49 U.S.C. 10707(c). Florida does not mention the term market dominance, has established no standards or time period to determine whether market dominance exists, and includes no reference to jurisdictional thresholds, revenue adequacy, or federal standards for maximum rate reasonableness. It requires overly broad disclosure of contract rates, provides that contract rates shall not unfairly discriminate (as a broad prohibition, inconsistent with Federal law), and fails to impose the stringent Federal threshold burden upon a protestant. It allows protest upon a showing of "substantial interest," a term it does not define, and purports to have jurisdiction over general rate increases, even though that jurisdiction has been removed by the Staggers Rail Act. The Florida railroads point out many more defects in its submission.

Contrary to 49 U.S.C. 10701a(c)(3)(B), which places the burden of proof upon a complainant, Pennsylvania places the burden upon the railroads in a complaint case. Illinois by "temporary" order (minimum time-120 days) and without a hearing, asserts jurisdiction immediately to reduce rail rates. This Commission has no similar power. Minnesota insists that all railroads shall have the same classification for each commodity. Under the Act, different railroads are allowed (and, in fact, encouraged) to charge different rates for the same commodity. Finally, Illinois, Ohio, and North Dakota state that they will follow our standards and procedures only so long as they deem them appropriate to rail regulation in their respective

States. This does not coincide with an intent faithfully and accurately to administer Federal standards and procedures to intrastate rail transportation.

More examples could be given but are not necessary. It is obvious that under these circumstances we may not unconditionally certify these States.

2. *States which provided more detailed Statements.* Alabama, Arkansas, Georgia, Iowa, Kansas, Missouri, Kentucky, Maryland, Montana, Nebraska, New Mexico,[2] Oklahoma, South Carolina, Tennesee and Virginia devoted considerable effort to their submissions. They reflect the basic provisions of the Staggers Act and adopt our Staggers Act rulemakings. However, the Interstate Commerce Act contains more than the Staggers Act amendments. While these submissions indicate an intent to comply, they are incomplete. Moreover, they fail to reflect Federal law in certain respects.

Among the primary purposes of the Act is the promotion of railroad revenue adequacy by encouraging competition and allowing carriers the rate freedom to compete in the marketplace. To this end, as discussed earlier, Section 10701a provides that every rate filed is reasonable unless it contravenes a specific provision of the Act. This provision indicates a Congressional purpose to encourage flexibility in rate filing. Yet, Montana provides that every rate increase must be prejustified with testimony and exhibits. Prejustification is contrary to rate flexibility and seriously impairs the ability of the railroads to respond to market

[2]We accept New Mexico's late-filed statement.

forces.[3] Nebraska requires prior approval by its Public Service Commission before a rate change can be put into effect. This is also contrary to rate flexibility and conflicts with the Federal requirement that increases go into effect on 20 days' notice and decreases on 10 days' notice. Furthermore, State sponsored publication of rate changes beyond the ordinary tariff filings only serves to multiply and prolong proceedings while detracting from ratemaking flexibility and railroad revenue adequacy.

The above defects are also coupled with a complete absence of detailed procedures which would assure us that, in their day-to-day operations, these States would correctly administer the Act. Under these circumstances, we cannot unconditionally certify them.

3. *The Procedural Submission of Texas.* Unlike the previously discussed submissions, Texas filed a detailed explanation of procedures. Texas submitted an explicitly procedural statement reflecting its day-to-day operations and setting forth exactly how it proposes to handle the rate cases coming before it. It described how a case would arise, and detailed its notice requirements as well as the consequences of defective notice. It explained how a proceeding is commenced, how evidence is filed, and how it makes a decision whether to suspend or investigate. It spelled out its evidentiary guidelines, set forth the

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[3]In Docket No. 38640, *Petition of Florida Rail Carriers to Review Act of Florida Public Service Commission on Rejecting Tariff Filings* (not printed), served July 21, 1981, we stated that there may be minimum filing requirements which would not violate the Staggers Act and that the States may tailor their standards to meet their own needs. However, Montana's requirement that "supporting testimony and exhibits" must accompany tariff filing (even if only to determine jurisdiction) places an undue burden on the railroads and directly violates the Interstate Commerce Act.

threshold showing to be made in suspension cases and the burden of proof in both suspension and complaint proceedings. It presented its protest and complaint procedure and its standards for deciding suspension and complaint cases, including its jurisdictional criteria. It described how proposed decisions are issued and then reviewed its appellate process.

The Texas submission is a thorough, step-by-step manual of standards, practice, and procedure. Unfortunately, the Texas submission contains certain elements that are inconsistent with Federal law. It provides for suspension on its own motion, contrary to 49 U.S.C. 10707(c)(1). It states that its jurisdiction is coextensive with ours. This is incorrect; for example, Texas no longer has jurisdiction over general rate increases, inflation based increases, and fuel adjustment surcharges. In its submission, Texas also requires excessive disclosure of contract rates. Its insistence that every term which would affect the economic or monetary cost of rail transportation must be disclosed could destroy the confidentiality of contracts and chill negotiations between carriers and shippers, contrary to 49 U.S.C. §10713. The essential terms should be related to and limited by the relevant standards of lawfulness.

We caution the States not to copy the Texas submission because, in addition to the problems outlined above, the railroads have made a number of criticisms in which we find merit. Not the least of these is that, in §§5.553 (d)(2)(c)(ii), Texas would allow the finding of an unreasonable rate without regard to jurisdictional limitation or the finding of market dominance. Its prohibition against rate refiling in less than 90 days is also unduly restrictive and is absent in Federal law. This and the other issues raised by the railroads should be addressed by the States.

Nevertheless, the Texas filing should be the prototype for the States when they submit their revised standards and procedures. That is, they should not merely adopt our major Staggers Act rulemakings, set forth their criteria for deciding suspension and complaint cases[4] and reflect the Interstate Commerce Act as a whole. Rather they should also present us with a step-by-step, detailed outline of their organization, day-to-day procedures, and practices.[5] As the Texas example demonstrates, only in this way will we have sufficient information before us, and in complete enough detail, to be able to find that each State will accurately administer the Act.

CONCLUSIONS

Railroads and individual parties have recommended that specific States either be certified outright or have their conditional certification continued. We have not premised this decision on those recommendations. We may not rely simply on hopes or beliefs that a State will implement Federal law to justify the grant of a 5-year certification. This is apparent to us because we have already been required, through Section 11501(c) petitions, to correct the actions of several of the States. Colorado and Indiana have attempted to exercise jurisdiction over general increases. Indiana has purported to suspend a railroad rate increase *after* the tariff had become effective and placed the burden of proof upon the railroad in a complaint case.

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[4]Including the threshold showing which must be made before suspension can take place, jurisdiction, burden of proof and evidentiary criteria.

[5]A State may wish to track a rail carrier tariff filing through the State agency's regulatory mechanism to determine if the results of each step conforms to Federal requirements.

Washington has recentiy found a rate unreasonable without first finding market cominance and has suspended a rate without considering whether the protestant had met the requirements imposed by Federal law. Florida has imposed a 30-day notice requirement and has required elaborate prejustification for rate filings. In our prior decision in this proceeding, we also noted grave questions raised by a number of railroads about some of these States as well as about Wisconsin, Louisiana, Ohio, and West Virginia. We have not yet refused to certify a State. However, each time we have corrected a State's action, we have promised to look very closely at that State's request for certification.

The Florida railroads have vigorously sought to prevent Florida's certification, arguing that Florida does not intend to adopt the standards and procedures required by Staggers. However, Florida has stated its intention to administer its law in accordance with the philosophy of the Staggers Act. It has submitted more information than many other States which we are allowing to refile, and it would be inappropriate to discontinue its provisional certification while continuing theirs.

We will continue to make every effort to assist the States in meeting their responsibilities under the new law. We remain confident that those States which desire to be certified will soon perfect that status. We also expect that, pending final decision on the further submissions, State actions will reflect the analysis in this decision.

Each State listed below is certified provisionally as having standards and procedures (including timing requirements) which permit it to exercise jurisdiction over intrastate railroad transportation in accordance with Federal law. Each certification will become final and uncondi-

tional only if, after examining the State's further standards and procedures filing, we decide that the proposal conforms to Federal law.

Alabama	Maryland	Oklahoma
Arkansas	Michigan	Oregon
Colorado	Minnesota	Pennsylvania
Florida	Missouri	South Carolina
Georgia	Montana	Tennessee
Idaho	Nebraska	Texas
Illinois	New Hampshire	Utah
Indiana	New Jersey	Virginia
Iowa	New Mexico	Washington
Kansas	New York	West Virginia
Kentucky	North Dakota	Wisconsin
Louisiana	Ohio	Wyoming

Each provisional certification will expire 60 days from the date of Federal Register publication of notice of this decision unless prior to that date the State files standards and procedures which confirm its intention to exercise its jurisdiction in conformance with Federal standards. Railroads and other interested persons may then file comments up to 20 days later.

Maine states that it no longer seeks certification. Mississippi, North Carolina and Rhode Island have chosen not to refile. These States will lose jurisdiction to regulate intrastate rail transportation on February 8, 1982. There will then be 14 States (including these four) and the District of Columbia that did not seek certification and have lost all jurisdiction to regulate intrastate rail transportation.[6] These States should inform us by March 10,

[6]The States are Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Mississippi, Nevada, North Carolina, Rhode Island, South Dakota, and Vermont.

1982 if they wish us to assume intrastate regulation. In the absence of such indication, we will not assert jurisdiction.

A copy of this decision will be served on the Governors, public service commissions and the transportation committees in the legislatures of each State. It will also be available for inspection in the Office of the Secretary, Interstate Commerce Commission. Notice of this decision will also be provided by Federal Register publication.

This decision does not significantly affect the quality of the human environment or conservation of energy resources.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Gresham and Clapp. Commissioner Gresham concurred with a separate expression.

(SEAL)

JAMES H. BAYNE
ACTING SECRETARY

COMMISSIONER GRESHAM, concurring:

The States should be aware that the appendix to this decision is incomplete. As the decision cautions, the appendix should not be viewed as a minimum standard which can be adopted without further analysis. Total reliance on the appendix may, in fact, preclude certification.

APPENDIX

Our review of the submissions and comments disclosed a number of major problem areas which State filings did not adequately address. These areas are listed below. This list is not all-inclusive, but is intended to alert the States to general areas to be addressed. Further review of the States' submissions may, of course, disclose other problems. The States should combine their substantive guidelines with their Rules of Practice as was done in the filing by Texas. (In doing so, a State may indicate an intention to adopt I.C.C. rules.)

At a minimum, each State seeking certification must: 1) acknowledge that it has lost jurisdiction over general rate increases, inflation-based rate increases and fuel adjustment surcharges; and 2) assure us that it will not require prejustification of rate changes; and 3) explain all its standards and procedures and demonstrate in its submission that they comport with Federal law in the following major areas:

I. Timing of Rail Rate Changes – 49 U.S.C. 10762 (c)(3)

A. No more than 20 days' notice of increases; 10 days' notice of decreases

B. 5- (can be extended to 8) month suspension/investigation period

II. Adequate Revenues – 49 U.S.C. 10701a as well as 49 U.S.C. 10704(a)(2), (3), and (4)

One of the purposes of Federal law is to promote adequate rail revenues. The Commission will yearly determine which carriers have adequate revenues. States are to assist efficient carriers in obtaining adequate revenue, to promote competition

and to encourage flexibility in rail rate filings. All rate actions must be consistent with the goal of revenue adequacy. Standards and procedures should reflect this.

III. Suspension – 49 U.S.C. 10707(c)(1)

A. States may not suspend on their own motion.

B. To obtain suspension, a protestant must show that it is *substantially* likely to prevail on the merits, that without suspension the proposed rate change will cause it substantial injury, and that an investigation with a refund and keep account provision will not protect it.

IV. Market dominance – 49 U.S.C. 10709

A. Market dominance must be found before maximum reasonable rates may be determined.

B. Market dominance must be determined within 90 days.

C. Even if a rate exceeds the threshold ratio, market dominance is not presumed. Other evidence of competition must then be considered.

V. General Reasonableness Standards

A. General Guidelines

49 U.S.C. 10707a (h) requires that the authority of the State Commissions to determine and prescribe reasonable rules, classifications, and practices may not be used directly or indirectly to limit the rates which rail carriers are otherwise authorized to establish under the subtitle

49 U.S.C. 10707a(a) provides that any rate may be established unless it is prohibited by a specific provision.

A. Existing rates are reasonable unless a complaint was filed against them by March 30, 1981 [within 180 days of the effective date (October 1, 1980) of the Staggers Act].

B. Minimum Rates — Variable Cost Test

1. Variable costs are those that vary directly with the service level. All rates which equal or exceed variable costs are conclusively presumed to exceed a minimum reasonable rate level. Any rate which does not contribute to going concern value is presumed not reasonable.

C. Maximum Rates

1. Rates can be examined for reasonableness only after rail market dominance is established.

2. Maximum reasonableness standards must reflect revenue adequacy considerations.

D. Zone of Rate Flexibility

1. 49 U.S.C. 10707a provides a detailed procedure permitting rate flexibility within a zone subject only to specific statutory limitations.

2. States may not investigate or suspend adjustments to base rates to cover inflation. To administer this provision, States must re-establish reasonable base rates (i.e., savings provision). [See Staggers Rail Act, P.L. 96-448, Section 229, 94 Stat 1934 (1980).] To determine the "adjusted base rate," the States must adopt and apply cost adjustment factors.

3. States may only investigate or entertain complaints regarding the 6 percent and 4 percent

zones of rate flexibility in accordance with 49 U.S.C. 10707a.

E. Refunds – 49 U.S.C. 10707

1. If a rate increase is suspended but ultimately found reasonable, the carrier must collect the difference form the shippers plus interest.

2. If a suspended rate decrease is found reasonable, the carrier may refund.

3. The State may establish procedures authorizing carriers to waive collection of insignificant amounts.

VI. Contract Rates

A. 49 U.S.C. 10713 contains detailed provisions permitting rail carriers and shippers to negotiate contracts for rail rates and services and containing the governing standards of review.

B. Contract rates are not subject to broad disclosure.

VII. Discrimination

49 U.S.C. 10741 changed the law with regard to discrimination. It provides that differences in rates, classifications, rules, and practices do not amount to discrimination if they result from different services.

Discrimination does not apply to:

1. Contract rates,

2. Surchargs or cancellation under 49 U.S.C. 10705a,

3. Separate rates for distinct rail services,

4. Rail rates applicable to different routes,

5. Expenses authorized under 49 U.S.C. 10751.

IX. Exemptions

49 U.S.C. 10505 allows exemption for a person, class of persons, or a transaction or service from regulation where regulation:

1. is not necessary to carry out the national transportation policy; and
2. either (a) the transaction or service is of limited scope, or (b) the application of the Act is not needed to protect shippers from the abuse of market power.

X. Transportation of Recyclable Materials

In setting standards for the rail transportation of recyclable materials, the States must act consistently with the federal law, 49 U.S.C. 10731.

IX. Limited Liability Rates

49 U.S.C. 10730 allows railroads to publish rates under which the liability of the carrier is limited to a value established by the written declaration of the shipper or by written agreement between the shipper and the carrier.

X. National Transportation Policy

All actions should be consistent with 49 U.S.C. 10101a.

APPENDIX H

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 388

SERVICE DATE
APR 22 1984

STATE INTRASTATE RAIL RATE AUTHORITY – P.L. 96-448

AGENCY: INTERSTATE COMMERCE COMMISSION

ACTION: NOTICE OF DECISION

SUMMARY: The Commission has decided to certify provisionally 40 states to exercise jurisdiction over intrastate railroad rates under Section 214 of the Staggers Rail Act of 1980. The certifications will expire on June 29, 1981, unless the State files standards and procedures which confirm its intent to exercise its jurisdiction in conformance with Federal standards. By August 28, 1981, the Commission will decide whether or not unconditionally to certify each of those States that has filed standards and procedures.

DATE: Each State must file its standards and procedures with the Commission on or before Monday, June 29, 1981. Railroads and other interested persons may file comments 20 days later.

EFFECTIVE DATE:
This decision will be effective on April 29, 1981.

FOR FURTHER INFORMATION CONTACT:
Richard B. Felder or Martin D. Zell
(202) 275-7693 or (202) 275-7138

SUPPLEMENTARY INFORMATION:

BACKGROUND

This proceeding was instituted to notify the States of how we intended to implement Section 214 of the Staggers

Rail Act of 1980. Section 214 requires the States to apply to us for certification of their standards and procedures for railroad rate regulation in order for them to retain jurisdiction over intrastate railroad transportation.

The notice initiating this proceeding, 45 Fed. Reg. 74571 (11-10-80), stated our view that the certification procedure should be a simple one. We required the States to submit sufficient information to permit us to conclude that each intended to exercise its jurisdiction consistent with the law, and to do so in a timely fashion.

THE CERTIFICATION REQUESTS

By the statutory deadline, January 19, 1981, 40 States filed for certification.[1] All expressed their intention to follow the standards and procedures of the Interstate Commerce Act, as amended by the Staggers Rail Act. Little or no information was offered to establish how the States planned to turn their intentions into standards and procedures which conform to Federal law. In fact, a number of requests for certification and comments filed by the railroads, suggested clear conflicts between State and Federal standards.

For example, Minnesota stated that tariff changes involving Minnesota intrastate commerce require approval of its Public Utilities Commission prior to publication. Only those changes which are noncontroversial may be approved without a hearing. Such standards do not meet the requirements of the Staggers Rail Act. 49 U.S.C. §10701a permits a rail carrier to establish any rate unless it is prohibited by law. On this record we are not prepared to cer-

[1]The Southeastern Pennsylvania Transportation Authority filed a request to confirm its view that as a local public body providing rail mass transportation services under the exemption of 49 U.S.C. §10504 it need not seek certification. We agree with SEPTA.

tify unconditionally that Minnesota has standards and procedures which will permit it to exercise its jurisdiction in conformance with Federal Law.

Questions raised by a number of railroads about Florida, Colorado, Wisconsin, Mississippi and Louisiana are equally serious. These States, with the exception of Wisconsin, have by regulation established elaborate justification and notification requirements which must be followed before a rate is changed. Florida adopted new regulations concerning general rate increases despite the fact that these matters are no longer subject to its jurisdiction. 49 U.S.C. 11501(b)(6). Nevertheless, each of these States has filed for certification and expressed its intent to abide by Federal standards and procedures. We also note that Colroado and Wisconsin have taken steps to conform certain of their rate filing requirements to the Staggers Rail Act of 1980. Our stated reservations about Minnesota apply to these States as well.

Questions have also been raised concerning the ability of Wisconsin to conform its standards and procedures to Federal law under its existing statute. The Chicago and Northwestern Transportation Company is concerned that Wisconsin's broadly phrased regulatory statute cannot accommodate the narrower standards of the Federal statute. We do not agree. We believe that a State with a broadly phrased statute is in an excellent position to apply the narrower standards of the Federal statute. As long as the existing State law is broad enough to use the Federal standards without creating a conflict, and the State demonstrates its plan to do so, we are prepared to certify the State.

Finally, a petition was filed by Conrail on April 7, 1981 objecting to our certification procedures and bringing to

our attention recent actions by Ohio and West Virginia which it believes are wholly inconsistent with Federal standards and procedures.

Conrail has described and documented actions taken by these States on March 31, 1981 which do not conform to Federal standards and procedures. Ohio and West Virginia suspended certain rates without determining whether Conrail has market dominance over the transportation service. The jurisdictional threshold for evaluating the reasonableness of rates was not mentioned. Other deficiencies are evident when the actions of these States are compared to Federal standards.

Conrail would have us deny certification to these States and assert jurisdiction under 49 U.S.C. §11501(b)(4((B) and approve the rates filed by Conrail. Neither of these actions appears to be necessary at this time. Section 11501(b)(3)(B) approves a transition period during which the State procedure in effect at the time the new law was enacted are deemed certified until we decide whether or not to certify the State, see No. 37595, *Burlington Northern, et. al. — Petition for Review* (not printed), decided January 28, 1981. Nevertheless, the actions taken by these States on the eve of our certification decision casts serious doubt on their January, 1981 certification requests.

CONDITIONAL CERTIFICATION

Under Section 214 we have an affirmative obligation to certify a State authority once we determine that the standards and procedures submitted by the States are in accordance with Federal law. We have tried to keep the process as simple as possible. However, based on the present record, we cannot make the finding required by the law.

We find ourselves in partial agreement with the position taken by the Association of American Railroads in its comments of March 16, 1981. We do not seriously question whether the expressions of intent by the States are genuine. However, the statute requires something more. We need "sufficient information" to base the findings which we must make under the law. Extensions may also be granted if other extraordinary circumstances related to needed legislative changes can be demonstrated.

Under these circumstances, we have decided to certify conditionally each State which has expressed its intention to exercise jurisdiction consistent with the law, and to do so in a timely fashion. Each provisional certification will expire on June 29, 1981, unless prior to that date the State files standards and procedures which confirm its intention to exercise its jurisdiction in conformance with Federal standards. Failure to file standards and procedures by June 29, 1981 will be taken as an expression of intent not to exercise jurisdiction consistent with the law, and will result in the immediate loss of provisional certification.

The one exception to this requirement is for a State which needs a legislative change to bring its standards and procedures into compliance with Federal law. An extension of the provisional exception will be considered if the State's legislature has not had a scheduled session since October 15, 1980.

We also have decided to certify conditionally the States which we earlier identified as having defects in their standards and procedures. These defects are mainly in agency rules which can be changed easily. We believe it is better to proceed this way than to deny certification in the face of a State's declaration of intent to comply.

We have tried to assist the States in meeting their

responsibilities under section 214. We recognize that there are transitional difficulties that are perhaps inherent in the changes required by the Staggers Act. Our Federal/State workshop on the Staggers Rail Act of 1980 was designed to answer some of the unanswered questions about the new law. Our staff is working with the National Association of Regulatory Utility Commissioners to distribute a handbook for the States on the new law. Through formal and informal contacts with the States we have attempted to explain and clarify the certification process.

We are prepared to certify those States which have enacted the Staggers Rail Act of 1980 as the law of their State. As we discussed earlier, certification is possible for States like Wisconsin which have broadly phrased statutes and can accommodate the narrower standards of the new law. State statutes which require rates to be just and reasonable can be read in conjunction with the market dominance requirement and jurisdictional threshold ratios of the Staggers Rail Act of 1980. A prohibition against unjustly discriminatory rates is clearly broad enough to accommodate the narrower standards of 49 U.S.C. §10741. Regardless of the method selected to comply with the standards of the Staggers Rail Act of 1980, all States must amend their procedures and timing requirements to conform with Federal law.

We will continue to make every effort to assist the States in meeting their responsibilities under the new law. We remain confident that those States which desire to be certified will perfect that status.

Each State listed below is certified conditionally as having standards and procedures (including timing requirements) which permit it to exercise jurisdiction over intrastate railroad transportation in accordance with Federal

law. Each certification will become final and unconditional only if after examining the State's standards and procedures filed as required above, we decide that the proposal conforms to Federal law.

Alabama	Maryland	Oklahoma
Arkansas	Michigan	Oregon
Colorado	Minnesota	Pennsylvania
Florida	Mississippi	Rhode Island
Georgia	Missouri	South Carolina
Idaho	Montana	Tennessee
Illinois	Nebraska	Texas
Indiana	New Hampshire	Utah
Iowa	New Jersey	Virginia
Kansas	New Mexico	Washington
Kentucky	New York	West Virginia
Louisiana	North Carolina	Wisconsin
Maine	North Dakota	Wyoming
	Ohio	

The 10 States and the District of Columbia that did not seek certification have lost all jurisdiction to regulate intrastate rail transportation.[2]

This decision does not significantly affect either the quality of the human environment or the conservation of energy resources, nor does it have any significant effect on small entites.

CONCLUSIONS

Each of the States listed in this decision is provisionally certified as having standards and procedures (including timing requirements) that permit it to exercise jurisdiction

[2]The States are Alaska, Arizona, California, Connecticut, Delaware, Hawaii, Massachusetts, Nevada, South Dakota, and Vermont.

over intrastate railroad transportation in accordance with Federal law.

Each provisional certification will expire on June 29, 1981, unless prior to that date the State files standards and procedures which confirm its intention to exercise its jurisdiction in conformance with Federal standards.

Each State seeking unconditional certification must file its standards and procedures with the Commission on or before June 29, 1981. Railroads and other interested persons may file comments up to 20 days later.

The Commission will decide by August 28, 1981, whether or not to certify unconditionally each of those States that has filed standards and procedures as required by this decision.

A copy of this decision will be served on the Governor, Public Service Commissions and the Transportation Committees in the legislatures of each State. It will also be available for inspection in the Office of the Secretary, Interstate Commerce Commission.

Authority: 49 U.S.C. 10321 and 11501.

Date: April 17, 1981

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam. Commissioner Gresham concurred with a separate expression. Commisioner Trantum was absent and did not participate.

Agatha L. Megenovich
Secretary

(SEAL)

COMMISSIONER GRESHAM, concurring:

Language within this decision would appear to provide an opportunity for the Commission to further extend the deadline for compliance with the Staggers Rail Act of 1980 beyond the 60-day limit set out above.

However, parties should be aware that only in the most compelling circumstances can the Commission respond to extension requests. It is clear that section 214 of the Staggers Act contained rigid statutory deadlines in order to accomplish State conformity within a very short, specific time. Indeed, as originally written, the House bill would have preempted completely State jurisdiction over intrastate rail rates. With that legislative background, the strict language of the statute seems to leave little room for administrative lattitude. The Commission, through this decision, is at the furthest extent of that latitude.

APPENDIX I

SERVICE DATE
NOV 4 1980

EX PARTE NO. 388

STATE INTRASTATE RAIL RATE AUTHORITY — P.L. 96-448

AGENCY: Interstate Commerce Commission

ACTION: Notice of Filing requirement and procedures for State exercise of jurisdiction over intrastate rail rates.

SUMMARY: To exercise jurisdiction over intrastate railroad rates, State authorities are required by the Staggers Rail Act of 1980 to submit, for ICC approval, standards and procedures consistent with the new legislation. This notice directs the filing of these proposals and explains the standard of ICC review.

DATE: Proposals are due January 29, 1981. No extensions are permitted.

ADDRESS: An original and six copies of the proposal, signed by an authorized State official, should be sent to:

Room 5340
Interstate Commerce Commission
Washington, D.C. 20423

FOR FURTHER INFORMATION CONTACT:
Richard B. Felder or Martin D. Zell
(202) 275-7693 or (202) 275-7138

SUPPLEMENTARY INFORMATION:

The Staggers Rail Act of 1980 amends 49 USC § 11501 to require that a State authority may only exercise jurisdic-

tion over intrastate railroad rates exclusively in accordance with the Interstate Commerce Act, as amended. The new law also prohibits the exercise of jurisdiction by State authorities over general rate increases under 49 USC §10706, inflation based rate increases under 49 USC 10712 or fuel adjustment surcharges which we may authorize.

The new law requires that, on or before January 29, 1981, each State authority wishing to exercise jurisdiction over intrastate rail rates, classifications, rules, and practices shall submit to the ICC for approval standards and procedures (including timing requirements) consistent with this legislation. The same process must be repeated every five years. During each five-year period, State standards may not be changed without notifying the ICC and receiving our approval.

We do not anticipate that this certification procedure will be a difficult one. We do not expect State authorities to submit unnecessarily detailed or complicated proposals reiterating the provisions of the statute. We merely wish to receive sufficient information to conclude that the State authority intends to exercise jurisdiction consistent with the law, and to do so in a timely fashion.

This decision does not significantly affect either the quality of the human environment or the conservation of energy resources.

A copy of this notice will be served on the Governors, Public Service Commissions and the Transportation Committees in the legislatures of each State. It will also be available for inspection in the Office of the Secretary, Interstate Commerce Commission.

Dated: November 3, 1980.

By the Commission, Chairman Gaskins, Vice Chairman Gresham, Commissioners Clapp, Trantum, Alexis and Gilliam.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX J

STATUTES

§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government –

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commisison;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation.

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentration of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

§ 10501. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation —

(1) by rail carrier, express carrier, sleeping car car-

rier, water common carrier, and pipeline carrier that is –

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent such jurisdiction is not limited by subsection (b) of this section or the extent the transportation is in the United States and is between a place in –

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

(b) The Commission does not have jurisdiction under subsection (a) of this section over–

(1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle; or

(2) transportation by a water common carrier when that transportation would be subject to this subchapter only because the water common carrier absorbs, out of its port-to-port water rates or out of its proportional through rates, a switching, terminal, lighterage, car rental, trackage, handling, or other charge by a rail carrier for services in the switching, drayage, lighterage, or corporate limits of a port terminal or district.

(c) This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2) the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

§ 10505. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle –

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuses of market power.

(b) The Commission may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party.

(c) The Commission may specify the period of time during which an exemption granted under this section is effective.

(d) The Commission may revoke an exemption, to the extent it specifies, when it finds that application of a provision of this subtitle to the person, class, or transportation is necessary to carry out the transportation policy of section 10101a of this title.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms of liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative

terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

(f) The Commission may exercise its authority under this section to exempt transportation that is provided by a rail carrrier as a part of a continuous intermodal movement.

(g) The Commission may not exercise its authority under this section (1) to authorize intermodal ownership that is otherwise prohibited by this title, or (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle.

§ 11501. Interstate Commerce Commission authority over intrastate transportation

(a) The Interstate Commerce Commission shall prescribe the rate, classification, rule, or practice for transportation or service provided by a carrier subject to the jurisdiction of the Commission under subchapter IV of chapter 105 of this title when the Commission finds that a rate, classification, rule, or practice of a State causes —

(1) between persons or localities in intrastate commerce and an interstate and foreign commerce, unreasonable discrimination against those persons or localities in interstate or foreign commerce; or

(2) unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title

if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedures to the Commission for review in accordance with this subsection.

(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to be certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in excercising jurisdiction over intrastate

rail rates, classifications, rules, and practices during the 5-year period commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

(5)(A) Certification of a State authority under this subsection is valid for the 5-year period beginning on the date of such certification. Prior to the expiration of such 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of

chapter 105 of this title may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice.

(d)(1) The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title when —

(A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and

(B) the State authority does not act finally on the change by the 120th day after it was filed.

(2) When a rail carrier files an application with the Commission under this subsection, the Commission shall prescribe the intrastate rate under the standards of subsection (a) of this section and chapter 107 of this title. Notice of the application shall be served on the State authority.

(e)(1) The Commission shall prescribe any rate, rule, or practice applicable to transportation provided entirely in one State by a motor common carrier of passengers pro-

viding transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title –

(A) if the carrier has requested the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice for permission to establish such rate, rule, or practice and the request has been denied (in whole or in part) or the State authority has not acted finally (in whole or in part) on the request by the 120th day after the carrier made the request; and

(B) if the Commission finds that the rate, rule, or practice in effect and applicable to such intrastate transportation causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce.

(2) For purposes of paragraph (1)(B) of this subsection, there shall be a rebuttable presumption that –

(A) any rate, rule, or practice applicable to transportation provided by a motor common carrier of passengers entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds–

(i) that such rate, rule, or practice results in the carrier charging a rate for such transportation which is lower than the rate such carrier charges for comparable interstate transportation of passengers;

(ii) on the basis of evidence presented by the carrier, that as a result of such rate, rule, or practice such carrier does not receive revenues from such transportation which exceed the variable costs of providing such transportation; or

(iii) that the department, agency, or instrumentality of such State having jurisdiction over such rate, rule, or practice failed to act finally (in whole or in part) on the request of the carrier to establish such rate, rule, or practice by the 120th day after the date the carrier made the request; and

(B) any rate applicable to transportation entirely in one State imposes an unreasonable burden on interstate commerce if the Commission finds that the most recent general rate increase applicable to transportation provided by motor common carriers of passengers in such State is less than the most recent general rate increase applicable to interstate transportation provided by motor common carriers of passengers under this subtitle.

(3)(A) A motor common carrier of passengers must file an application with the Commission for prescription under this subsection of a rate, rule, or practice applicable to transportation provided entirely in one State by such carrier. When such application is filed with the Commission, the carrier shall certify that he has notified (i) the Governor of such State, (ii) the department, agency, or instrumentality of such State which denied, or failed to take action on, the request of such carrier related to such rate, rule, or practice, and (iii) such other interested persons as the Commission may specify by regulation. The Commission shall take final action on any such application not later than 60 days after such application is filed with the Commission.

(B) The Commission shall establish, by regulation, procedures for processing applications under this subsection.

(4) This subsection shall not apply to any carrier owned or controlled by a State or local government.

(5) No State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to scheduling of interstate or intrastate transportation provided by motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title on an authorized interstate route or relating to the implementation of any reduction in the rates for such transportation except to the extent that notice, not in excess of 30 days, of changes in schedules may be required. This paragraph shall not apply to intrastate commuter bus operations.

(6)(A) No motor common carrier of passengers providing transportation subject to the jurisdiction of the Commission may charge or collect a rate for intrastate service provided on an authorized interstate route which constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this title.

(B) When the Commission decides, upon complaint by any person, that a reduction in a rate charged or collected by such a motor common carrier of passengers for intrastate service provided on an authorized interstate route constitutes a predatory practice in contravention of the transportation policy set forth in section 10101(a) of this tilte, the Commission shall prescribe the rate applicable to such service.

(f) The Commission may take action (1) under this section only after a full hearing, or (2) with respect to a rate, rule, or practice of a motor common carrier of passengers, in accordance with the procedures established by the Commission under subsection e(3)(B) of this section. Action of

the Commission under this section supersedes State law or action taken under State law in conflict with the action of the Commission.